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# Analysis

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## A Paradigm of Orthodoxy: *Johnston v NEI International Combustion Ltd*

In *Johnston v NEI International Combustion Ltd*<sup>1</sup> the House of Lords reaffirmed that before there is liability to make reparation in delict the pursuer has to have sustained harm as a consequence of the defender's wrongful conduct: *damnum injuria datum*. As Lord Rodger of Earlsferry observed:<sup>2</sup>

So far as the law of tort [delict] is concerned, it is trite that the “ground of any action based on negligence is the concurrence of breach of duty and damage” and that “a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible”...

In other words, there must be a concurrence of *damnum* (harm sustained) and *injuria* (breach of a duty of care) before liability in negligence arises: if there is no harm to the pursuer, there is no liability to make reparation. Harm to the pursuer is a constituent of – as well as a consequence of – negligence. But what constitutes harm for this purpose?

### A. HARM

The claimants had been negligently exposed to asbestos. Fibres had entered their lungs. They had developed pleural plaques. These are areas of fibrous thickening of the pleural membrane which surrounds the lungs. Apart from exceptional cases – which did not arise in these claims – pleural plaques are asymptomatic, i.e. do not cause any symptoms, do not increase the susceptibility of the claimants to other diseases or shorten their lives. In short they had no effect at all on the claimants' health. But pleural plaques were indicators that asbestos fibres had entered their lungs and that the fibres might cause asbestosis, mesothelioma or lung cancer in the future: and the risk of contracting asbestos-related illnesses was significantly higher in persons with plaques than persons who had been exposed to asbestos but had not developed plaques. Not surprisingly, because of the increased risk of future asbestos-related illness, persons diagnosed as having plaques became anxious about the possibility of the risk materialising, and in some cases this anxiety caused a recognised psychiatric illness.

<sup>1</sup> [2007] UKHL 39, [2007] 3 WLR 876 (sub nom *Rothwell v Chemical & Insulating Co Ltd*).

<sup>2</sup> *Johnston* at para 83, quoting *Watson v Fram Reinforced Concrete Co (Scotland) Ltd* 1960 SC (HL) 92 at 109 per Lord Reid and *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 771-772 per Lord Reid.

Because pleural plaques were benign and asymptomatic and did not cause any future asbestos-related disease, the House of Lords held that the development of plaques could not be characterised as harm (or material damage) to the claimants and therefore they had no cause of action. Moreover, it had been settled in *Gregg v Scott*<sup>3</sup> that the risk of contracting an illness in the future and any anxiety that the risk might materialise did not amount to reparable harm: accordingly, the claimants in *Johnston* could not sue in respect of the increased risk of contracting asbestos-related injuries in the future and their anxiety that they might do so. Nor would their Lordships accept that if the non-actionable pleural plaques, the non-actionable risk of developing diseases and the non-actionable anxiety were aggregated, this would somehow be transformed into actionable harm. For Lord Rodger, “[t]he logical difficulties of such an approach are self evident and, in my view, insurmountable”,<sup>4</sup> for Lord Scott of Foscote, “[n]ought plus nought plus nought equals nought”.<sup>5</sup> Few would disagree.

It was, of course, accepted that if any of the claimants developed an asbestos-related illness in the future they would *then* have a right to sue in delict but they would not obtain compensation for any anxiety experienced by them before they contracted the disease.

## B. ANALYSIS

Along with *Fairchild v Glenhaven Funeral Services Ltd*<sup>6</sup> and *Barker v Corus UK Ltd*,<sup>7</sup> *Johnston* is a judicial response at the highest level to the difficulty of awarding adequate compensation under the current law of delict to the victims of asbestos. In *Fairchild* the principles of causation were abandoned in order to aid claimants;<sup>8</sup> conversely, in *Barker* the rules on joint and several liability were modified to protect defenders.<sup>9</sup> Ironically, *Barker* has been reversed by Parliament in so far as mesothelioma cases are concerned.<sup>10</sup> In contrast *Johnston* is a paradigm of orthodox legal reasoning, a welcome relief to those learning – and teaching – the law of delict.

Yet there must be some sympathy for the claimants. Lord Hope expressed regret that the claimants “who are at risk of developing a harmful disease and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy”.<sup>11</sup> He agreed with Lord Scott, who had maintained<sup>12</sup> that the claimants might have had an action against their employers for breach of their contracts of employment: while harm is the gist of negligence, it is not necessary for a claim in

3 [2005] UKHL 2, [2005] AC 176.

4 *Johnston* at para 89.

5 *Johnston* at para 73.

6 [2002] UKHL 22, [2003] 1 AC 32.

7 [2006] UKHL 20, [2006] 2 AC 572.

8 See J Thomson, “The raising of Lazarus: the resurrection of *McGhee v National Coal Board*” (2003) 7 EdinLR 80.

9 See J Thomson, “*Barker v Corus*: *Fairchild* chickens come home to roost” (2006) 10 EdinLR 421.

10 Compensation Act 2006 ss 3, 16.

11 *Johnston* at para 59.

12 *Johnston* at para 74.

contract where only a breach has to be established. However, since it had not been argued, their Lordships did not develop this intriguing point. But Scottish victims may not have to wait for common law developments. At the time of writing the Scottish Government has stated that it intends to introduce a Bill under which pleural plaques are to be treated as harm or damage for the purposes of the law of delict;<sup>13</sup> in other words the decision in *Johnston* will be reversed. This will mean that victims will be able to obtain solatium for the anxiety caused by the increased risk of contracting an asbestos-related illness. Before *Johnston*, this was around £5000 – £10000 and was awarded as provisional damages under section 12 of the Administration of Justice Act 1982 so that an application could be made for a further award of damages should the pursuer later contract an asbestos-related illness. If legislation is enacted, it is expected that this practice will be resumed.

A final point. In *Johnston* one of the claimants' suffered not only anxiety but clinical depression. Unlike pleural plaques, a recognised psychiatric illness is actionable harm for the purposes of the law of negligence. The question was whether his employer had owed him a duty of care to prevent the psychiatric illness arising. This depended on whether it was reasonably foreseeable that an employee of ordinary fortitude would suffer a recognised psychiatric illness – as opposed to mere anxiety – on learning that he had pleural plaques and therefore had an increased risk of contracting an asbestos-related disease. All their Lordships agreed that the answer to this question was no. However it was contended that as the employer owed a duty of care to prevent the employee from contracting a physical asbestos-related illness, he was a primary victim and therefore following *Page v Smith*<sup>14</sup> the psychiatric illness did not have to be reasonably foreseeable. While accepting that the decision was controversial, their Lordships refused to take the opportunity to overrule *Page*. Instead they distinguished it on the grounds that (i) in *Page* the foreseeable event – the collision – which might cause a physical or psychiatric injury had happened, while here the foreseeable event – contracting an asbestos-related illness – which might cause a psychiatric illness was still to occur, and (ii) in *Page* the psychiatric injury was caused by the event – the collision – which amounted to the breach of duty, while here the psychiatric injury had been caused by the diagnosis that the claimant had pleural plaques and therefore learning that he had a greater risk of contracting an asbestos-related illness, and not by the employer's breach of duty in exposing him to asbestos in the first place. Thus the Byzantine legal reasoning on delictual liability for psychiatric injury is given a further twist.

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13 Scottish Government, "News release: asbestos claims bill planned", 29<sup>th</sup> Nov 2007. See [www.scotland.gov.uk/News/Releases/2007/11/29102156](http://www.scotland.gov.uk/News/Releases/2007/11/29102156).

14 [1996] AC 155.

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## Reform of Limitation in Personal Injury Actions

In December 2007 the Scottish Law Commission published its Report on *Personal Injury Actions: Limitation and Prescribed Claims*.<sup>1</sup> The Report follows two references from the Scottish Ministers, the first of which requested that sections 17(2)(b), 18(2)(b) and 19A of the Prescription and Limitation (Scotland) Act 1973 be examined and the second of which related to the position of personal injury claims which had been extinguished by the long negative prescription prior to 26 September 1984.<sup>2</sup>

The Report supports the *status quo* in relation to a number of matters. For example, it does not recommend the revival of personal injury claims which had prescribed before 1984, nor does it recommend any changes to practice or procedure.<sup>3</sup> The Commission does, however, make some important proposals for change, and it is those proposals with which this note is chiefly concerned.

### A. COMMENCEMENT OF THE LIMITATION PERIOD

At present, the limitation period runs from the date of injury or, if later, the date on which a continuing wrong ceases. The pursuer may, however, argue for a later commencement date, being the date on which he became aware, or the date on which it would have been reasonably practicable for him to become aware, of certain statutory facts. In terms of section 17(2)(b) of the Act, these facts are that the injuries are sufficiently serious to justify suing and are attributable to an act or omission of the defender.

The Commission considers that a date of awareness provision remains necessary to deal with cases of latent disease.<sup>4</sup> Although the need for an awareness provision has been questioned, given the existence of an equitable discretion,<sup>5</sup> the Commission takes the view that reliance on judicial discretion risks inconsistency. The Commission believes, however, that the existing awareness provision operates too restrictively.<sup>6</sup> It is a well-established principle that all damages arising from a legal wrong must be sought in one action. The first statutory fact (that the injuries are sufficiently serious to justify suing) therefore seeks to protect a pursuer who initially appears to have

1 Scot Law Com No 207 (2007) (henceforth *Report*); available on [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

2 The second reference was prompted by the plight of victims of abuse allegedly perpetrated in the 1950s and 1960s. Although personal injury claims were removed from the operation of the long negative prescription in 1984, that change was not retroactive.

3 *Report* parts 4-5.

4 *Cartledge and Others v E Jopling & Sons Ltd* [1963] AC 758 highlighted the injustice which could be occasioned in the absence of such a provision.

5 Under s 19A of the Act. See D M Walker, *The Law of Prescription and Limitation of Actions*, 6<sup>th</sup> edn (2002) 110.

6 *Report* para 2.1.

suffered only minor injuries. However, that fact is to be established on the assumptions that the defender did not dispute liability and was able to satisfy a decree. The Commission considers that these assumptions might invite the bringing of an action in respect of a non-serious injury. Of particular concern to the Commission is the assumption of admitted liability. This appears to set a low threshold for the seriousness of the injury and creates a tension with the initial phrasing of the provision.<sup>7</sup>

The Commission therefore recommends deletion of the statutory assumptions.<sup>8</sup> Thus, the statutory test would focus *exclusively* on the seriousness of the injuries. This is sensible: it is clearly unsatisfactory that the existing assumptions might serve to activate the limitation period prematurely. This could work an injustice given that all damages must be recovered in one action. It should be noted, however, that the statutory assumptions also feature in section 22B of the Act (limitation of personal injury actions arising under the Consumer Protection Act 1987) to which the Commission's recommendations do not extend.

The Commission also favours retention of a constructive awareness test. If *actual* awareness alone were required, a claimant could prevent time running by failing to make reasonable enquiries. Nonetheless, the Commission is unhappy with the existing statutory test of reasonable practicability. That test, as currently interpreted, involves asking whether there was a step which could have been taken without excessive expenditure of money, time or effort and which would have resulted in awareness of the relevant fact. Such a test can produce harsh results, as in *Elliot v J & C Finney (No 1)*<sup>9</sup> where it was held to have been reasonably practicable for a hospitalised road traffic accident victim to enquire of an attending police officer about the defender's identity, notwithstanding that the pursuer's main concern at the time was for his own recovery.<sup>10</sup>

In discussing options for a replacement test, the Commission considers whether it should be objective or subjective in nature. While an objective approach might occasion unfairness to a pursuer of limited intelligence, a subjective approach might extend the period within which defenders are exposed to the risk of litigation. After some vacillation, the English courts have settled on an objective approach.<sup>11</sup> In view of the judicial discretion to disapply the limitation period, it was thought appropriate to interpret the knowledge provision with a greater regard to potential injustice to defendants.

The Commission, however, considers it inappropriate to rely too heavily on judicial discretion in this context. It is the awareness provision which is "primary", the discretion being designed to deal with anomalous cases. For the Commission the "critical question" is whether the pursuer's lack of awareness was "excusable".<sup>12</sup> The Commission therefore recommends that time should not run while the pursuer is,

<sup>7</sup> *Report* para 2.10.

<sup>8</sup> *Report* para 2.12.

<sup>9</sup> 1989 SLT 208.

<sup>10</sup> The Inner House endorsed this approach in *Agnew v Scott Lithgow Ltd (No 2)* 2003 SC 448.

<sup>11</sup> *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76.

<sup>12</sup> *Report* para 2.52.

in the court's opinion, excusably unaware of one or more of the statutory facts. This proposal is to be welcomed and, if implemented, will assist pursuers who, at present, might be fixed with constructive awareness despite having a reasonable excuse for not asking certain questions.

In *Carnegie v Lord Advocate*<sup>13</sup> the statutory provisions were interpreted as allowing a wholly *distinct* injury arising from the same delict to generate a new limitation period.<sup>14</sup> The Commission suggests that such an approach can produce anomalous results. Moreover, it is inconsistent with the approach adopted in relation to prescription of obligations. The prescriptive period runs from the first concurrence of *damnum* and *injuria* and is not postponed by the emergence of a later and separate illness.<sup>15</sup>

The Commission therefore recommends reversal of *Carnegie* given that it runs counter to the principle that only one cause of action arises from a delictual act.<sup>16</sup> From a principled perspective this proposal is welcome. Should it be implemented, the position on limitation will accord with that on prescription. The divergence of approach which has emerged on this point is both inappropriate and regrettable and it is right that a proposal has been made to remedy this.

## B. THE LENGTH OF THE LIMITATION PERIOD

The most radical recommendation concerns the length of the limitation period. The Commission recognises that, some fifty years after the triennium's introduction,<sup>17</sup> arguments may exist in favour of a longer period. Fewer people are now employed in heavy industry, changes have occurred in the nature of personal injury litigation practice and there is a greater need for expert reports to establish liability, which may not be capable of production within tight timescales. The Commission therefore proposes extending the limitation period in personal injury actions from three to five years.<sup>18</sup> This makes sense. It certainly seems anomalous that, under the current law, one has five years to pursue a defender in respect of a bump to one's car (because of the short negative prescription) while, if one had been injured by the impact, the action would require to be pursued within three years (the action being subject to limitation as it includes an element of personal injury).<sup>19</sup>

The most compelling argument for extending the limitation period arises from the time-consuming investigations required in occupational disease cases. Although single event cases are not productive of the same type of investigation, the Commission did not wish to introduce any distinction between categories of personal

13 2001 SC 802.

14 See also *Shuttleton v Duncan Stewart & Co* 1996 SLT 517; *Hill v McAlpine* 2004 SLT 736.

15 *K v Gilmartin's Exrx* 2004 SC 784.

16 *Report* para 2.24.

17 Law Reform (Limitation of Actions etc) Act 1954.

18 *Report* para 2.59.

19 The Commission has previously encountered difficulty in justifying such a distinction. See *Report on Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970) para 114.

injury claim. Nonetheless, exactly such a result will follow if this proposal is implemented. That is because personal injury actions arising under the Consumer Protection Act 1987 are unaffected by these proposals.<sup>20</sup>

The Commission's recommendations similarly do not extend to defamation and harassment actions<sup>21</sup> and if such actions are also to remain subject to a three-year limitation period, the question arises as to whether it is appropriate to have two different limitation periods in operation. While a three-year limitation period might be considered adequate for defamation and harassment actions, it is regrettable that the Commission was not given a wider remit so that these issues might have been fully canvassed.

In terms of sections 17(3) and 18(3) of the 1973 Act, periods of legal disability owing to nonage and unsoundness of mind are disregarded in the computation of the limitation period. The Commission considers the term "unsoundness of mind" to be outdated, potentially offensive and productive of difficulties for mental health practitioners. It proposes replacing the term with a reference to the pursuer being incapable within the terms of section 1(6) of the Adults with Incapacity (Scotland) Act 2000. This represents a useful updating of the statutory terminology. The term "unsoundness of mind" is not, however, restricted to those statutory provisions which were under review.<sup>22</sup> Again, it is difficult to resist the conclusion that a broader remit for the Commission would have been appropriate.

### C. JUDICIAL DISCRETION TO EXTEND THE PERIOD

The discretion embodied in section 19A of the 1973 Act allows the court to override the limitation period if it is equitable to do so. Although the discretion might create uncertainty for defenders and their insurers, the Commission recommends its retention principally on the grounds of its flexibility. In its Discussion Paper,<sup>23</sup> the Commission had canvassed whether the exercise of discretion should be subject to a temporal limit. This elicited an unenthusiastic response from consultees. The Commission does not therefore recommend the imposition of any further time limit. It is submitted that this is the correct decision. Quite apart from the valid objections stated by consultees,<sup>24</sup> it is thought that the introduction of a further time period would over-complicate the legislation.

The Scottish legislation – in contrast to its English equivalent<sup>25</sup> – contains no guidelines as to the factors which are relevant to the exercise of discretion. Some members of the legal profession have indicated that they would welcome the introduction of a statutory list of relevant factors to assist the court. At the time of issue of its Discussion Paper, the Commission discerned no benefit in this proposal,

<sup>20</sup> Limitation of such actions is governed by ss 22B and 22C of the 1973 Act.

<sup>21</sup> A three-year limitation period is imposed by ss 18A and 18B of the 1973 Act, respectively.

<sup>22</sup> The term also appears in ss 18A(2), 18B(3), 22B(4) and 22C(3) of the 1973 Act.

<sup>23</sup> Scot Law Com DP No 132, 2006.

<sup>24</sup> *Report* para 3.27.

<sup>25</sup> Limitation Act 1980 s 33(3).



as the general approach had been settled in the cases.<sup>26</sup> Most consultees agreed with that view, some considering that a list would distort the exercise of the discretion and would risk greater weight being attached to the listed factors. This writer resolutely agrees with those consultees. Nonetheless, the Commission has performed a *volte face*, having been persuaded by a “significant minority” that a statutory non-exhaustive list might prove beneficial, both as generating greater consistency and also as providing guidance for the purposes of pleading. This, in turn, would assist the court in exercising its discretion. The Commission proceeds to stipulate seven factors to which the court may have regard in exercising its discretion, with an eighth factor being “any other matter which appears to the court to be relevant”.<sup>27</sup>

With respect, it is difficult to see what this list adds to what has already been decided in the cases and why guidance cannot simply be elicited from the existing case law. The Commission proposes that the listed factors should not take precedence over ones which are not specifically listed. Yet, is there not a real danger that, by enshrining certain factors in statute, exactly such a result may follow? Statutory guidelines invite a somewhat formulaic approach and may stifle imagination.

Moreover, the first and third of the listed factors present some cause for concern. These state that the court may have regard to the period which has elapsed since the right of action accrued, and the effect which that period is likely to have had on the defender’s ability to defend the action and on the availability and quality of evidence. The Commission consciously chose to focus on the time since the right of action accrued rather than the time since the expiry of the limitation period. This might, however, work an injustice in cases where injuries are done to a young child. In such cases, the child’s right of action has accrued but the limitation period is not activated until the period of nonage has ceased. The court may, therefore, be entitled to consider a lengthy period notwithstanding that little time has elapsed since the expiry of the limitation period.

This approach seems wrong. The fact that the injury is done to a child rather than an adult should surely be irrelevant. Indeed, the approach does not seem to chime with certain *dicta* in *McCabe v McLellan*,<sup>28</sup> where the Inner House stressed that the rule concerning disregard of any period of nonage did not create unfairness and simply recognised that a person was unable to enforce his rights while subject to legal disability. Yet, under the Commission’s proposals, that very period of legal disability could be considered by the court.

#### D. CONCLUSIONS

There is much to be commended in this Report. The recommendation of a longer limitation period will be welcomed by those acting for pursuers, particularly those engaged in the pursuit of occupational disease claims. The removal of the statutory assumptions in relation to the first statutory fact and the new approach to constructive

<sup>26</sup> See e.g. *B v Murray (No 2)* [2007] CSIH 39, 2007 SC 688.

<sup>27</sup> *Report* para 3.36.

<sup>28</sup> 1994 SC 87.

awareness should result in a fairer regime, while the proposed abolition of the separate triennium clearly accords with legal principle.

Sections 17 and 18 of the 1973 Act are rewritten in the Commission's draft Bill to take account of these various recommendations. However, the wording is convoluted to say the least. The existing provisions have been criticised as being "by no means simple or clear"<sup>29</sup> and the same criticism can be made of the proposed new wording.

While assimilation of the short negative prescription and limitation periods is to be applauded, statutory product liability claims, defamation and harassment actions are unaffected by these proposals and so the assimilation is incomplete. Indeed, if these proposals are implemented in isolation, two different periods of limitation will emerge and it has to be questioned whether this is desirable. There is surely considerable merit in having a uniform period of limitation in respect of all delictual actions. Difficulties can be readily anticipated in personal injury actions arising in the field of product liability. The Commission's proposals would lead to common law actions being subject to a five-year limitation period while those brought under the Consumer Protection Act's strict liability regime would remain subject to the triennium. This seems anomalous at best and a recipe for confusion at worst. Pursuers might be tempted to accept the burden of proving fault in order to secure a longer limitation period. It is submitted that a more unified approach to reform of the limitation regime would have been appropriate.

In relation to judicial discretion, this writer remains unpersuaded that a statutory list of factors is either necessary or desirable. Indeed, it is suggested that there is much to commend the simplicity of the current provision.

Notwithstanding these criticisms, the Commission's proposals, if implemented, should result in a fairer limitation regime. The Report therefore deserves a broad welcome, albeit not an entirely unqualified one.

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## Redrawing the Landscape of the Economic Wrongs

In *OBG Ltd v Allan*,<sup>1</sup> the House of Lords has taken the opportunity to reconsider the principles which underlie delictual liability for wrongful interference with business.<sup>2</sup> As a consequence the law has not only been simplified but the scope of potential liability has been substantially reduced. But while robust, their Lordships' analysis

<sup>29</sup> Walker, *Prescription and Limitation* (n 5) 110.

<sup>1</sup> [2007] UKHL 21, [2008] 1 AC 1.

<sup>2</sup> The case also raises important issues concerned with the protection of confidential information and the limits of the tort of conversion: this case note is not concerned with these issues.

lacks elegance and will not appeal to those who maintain that some overarching principle can give coherence to this area of the law.

The starting point is delictual liability for inducing a breach of contract. If A induces B to break his contract with C, then C is entitled to sue A in delict rather than sue B for breach of contract. Before A is liable he must know of the existence of the contract between B and C and intend that B should break the contract with C: i.e. A must intend to procure a breach of contract. A is liable because he is an *accessory* to B's breach: if there is no breach there is no liability. The means used by A to induce B can be perfectly lawful, for example if A is prepared to pay B a higher fee if he breaks his contract with C and comes to work for A. Moreover, where A has knowingly induced the breach, there is liability even if A did not intend to harm C but was only motivated by economic self interest.<sup>3</sup>

Their Lordships rejected the idea that inducement was simply a species of some wider genus tort/delict viz causing loss by unlawful means. Instead they stressed how it was accessory to the breach of contract which A had induced. If A's acts did not induce a breach of contract, for example because of an exemption clause, there could be no liability since the tort/delict is accessory to such a breach. Moreover, the tort/delict does not apply where A prevents B from performing the contract with C: as B's breach has not been induced by A, A cannot be liable as an accessory to B's breach. Inducement of a breach of contract thus returns to being a tort/delict of narrow scope.

However, the House recognises that there is a tort/delict of causing loss by unlawful means or unlawful interference in the claimant's trade or business. Unlike inducement of breach of contract, this is a tort/delict of primary liability.

There are two elements. First, the defender A must intend to harm the claimant C economically: i.e. A must intend to cause economic loss to C. If A's intention to harm C cannot be established, there is no liability. Again this contrasts with inducement of breach of contract where A can be liable even though he had no intention to harm C when he induced B to break his contract with C. Second, the means used by A in order to harm C must be unlawful. In most cases the means used will involve interference by A with the freedom of a third party, B, to engage with C: in such a case the unlawful means used by A must be unlawful vis-à-vis B so that it would be actionable by B.<sup>4</sup> For example:

<sup>3</sup> However, if the breach is not an end in itself for A nor a means to an end desired by A, there is no liability merely because a breach of contract was a foreseeable consequence of A's acts. For example: A has a contract to make a record for B. A changes her mind and refuses to make the record. As a result, B is in breach of his contracts with the musicians who would have played at the recording. A is not liable to the musicians for inducing B to break his contract with them even although it is a foreseeable consequence of her decision not to make the recording; the breach of the musicians' contracts by B was neither an end desired by A nor a means of achieving such an end: cf *Millar v Bassey* [1994] EMLR 44, disapproved in *OBG*.

<sup>4</sup> This is subject to the qualification that A's conduct is still to be treated as actionable by B even though B could not in fact sue because he had not sustained any loss. For example, A threatens B that he will break his contract with B unless B ceases to contract with C. B submits to the threat. A's threat of a breach of contract will still constitute unlawful means for the purpose of an action by C against A for intimidation

- (i) A steals B's tools which prevents B fulfilling a contract with C. A is not liable to C for inducing B to break his contract with C as A has not induced the breach but has prevented B's performance. But A has used unlawful means, i.e. theft against B and will therefore be liable to C for causing loss to C by unlawful means provided it can be proved that A intended to harm C.
- (ii) A breaks his contract with B. As a consequence, B is unable to perform his contract with C. A is not liable to C for inducing B to break his contract with C as A has not induced the breach but has prevented B's performance. But A has used unlawful means, i.e. his own breach of contract with B, and will therefore be liable to C for causing loss to C by unlawful means provided it can be established that A intended to harm C.

Liability extends to situations where A interferes with the freedom of B to engage with C which in turn interferes with C's freedom to engage with D and so on. For example:

- (iii) A induces B to break his contract with C. As a consequence C is unable to fulfil his contract with D. A is liable to C for inducing B to break his contract with C whether or not A intended to harm C. But A has used unlawful means i.e. inducing a breach of contract between B and C, and will therefore be liable to D for causing loss to D by unlawful means provided it can be established that A intended to harm D.

Lord Hoffmann was not prepared to extend the concept of unlawful means to include acts which were against the law vis-à-vis the third party, B, but which did not affect his freedom to deal with the claimant, C (or D or E etc).<sup>5</sup> For example A infringes B's intellectual property rights. This is a breach of statute and B will have a statutory remedy against A. But A's conduct will result in a loss to C when C has received from B an exclusive right to use the property. A is not liable to C because his conduct has not interfered with B's freedom to perform his obligations towards C and therefore does not constitute unlawful means for the purpose of the delict/tort of causing loss by unlawful means. On the other hand, Lord Nicholls continued to support the traditional view that any civil or criminal wrong could constitute unlawful means provided the third party was being used as the instrument to harm the claimant.<sup>6</sup> Thus the breach of B's intellectual property rights in the example above would still not constitute unlawful means because it was not used by A as the instrument by which to harm C. It is thought that Lord Hoffmann's criterion for unlawful means has the merit of relative certainty and is more likely to ensure that the scope of this amorphous delict/tort is kept within reasonable bounds.

*OBG* is an important case. It has redrawn the landscape of the economic delicts/torts. Hitherto leading cases on direct and indirect interference with

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even though B could not sue A as he has not suffered any loss: it is enough that A's threat is of something which would have been actionable if B had suffered loss: see *OBG* at para 49 per Lord Hoffmann.

<sup>5</sup> *OBG* at paras 51 ff. Lord Walker, Baroness Hale and Lord Brown agreed with Lord Hoffmann.

<sup>6</sup> *OBG* at paras 143 ff.

contractual relations have been consigned to the wastepaper basket. The often ingenious but rarely convincing attempts to discover a unified theory of causing loss by unlawful means which could accommodate inducing breach of contract have to be abandoned. The law can now be stated simply:

A is liable to C for causing loss by unlawful means if he uses unlawful means against B with the intention of causing economic loss to C: both the intention to harm and the use of unlawful means are necessary before there is liability.

A is liable to C for inducing B to break his contract with C, if A knows of the contract between B and C and induces C – by using lawful or unlawful means – to break the contract. The inducement must result in a *breach* of contract. A is liable whether or not he intended to harm C economically.

It will be noticed that the only situation where there can be liability without the intention to harm C is the narrowly defined delict/tort of inducing breach of contract. This means that the scope of potential liability for causing economic loss is restricted to persons who are prepared to use unlawful means with the intention to cause their victim economic loss. And even in the case of inducement of a breach of contract there is no liability unless the defender intended that the contract should be broken. In other words, delictual liability is now restricted to persons who have in fact engaged in wrongful behaviour.

A final few points. The delict/tort of intimidation appears to have been absorbed into the wrong of causing loss by unlawful means. Scots lawyers will note that conspiracy remains a separate delict/tort and that the *Crofter*<sup>7</sup> case has not yet been consigned to oblivion. And one does not have to be a purist to find the concept of a wrong of accessory liability as an unprincipled accretion to the Scots law of delict.

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## Missing the Boat: Lien for Damages

The Outer House case of *Air and General Finance Ltd v RYB Marine Ltd*<sup>1</sup> raises interesting questions in relation to lien, one of the few implied securities recognised by Scots law. A motor yacht known as “Keleco” of Southampton was sold by RYB (Marine Sales) Ltd to RYB Marine Ltd, the first defenders. RYB Marine received loan finance from the pursuers, to whom they granted a ship mortgage. This was duly registered in the Registry of Shipping soon after the Bill of Sale in respect of the transfer. Before the first defenders took delivery, RYB (Marine Sales) purported to sell the vessel again, this time to David Johnstone, the second defender. He made

<sup>7</sup> *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* 1942 SC (HL) 1.

<sup>1</sup> [2007] CSOH 177.

payment of the price and the vessel was delivered to him in Scotland.<sup>2</sup> Both sales were carried out by the same director of RYB (Marine Sales), who was also a director of RYB Marine.

Shortly afterwards, RYB Marine defaulted on the loan. The pursuers raised proceedings against them for payment. These were undefended. Against Johnstone, they sought declarator that they were entitled to enforce the mortgage and sell the yacht. He, however, averred that because he had not been given a good title, he had a damages claim against RYB (Marine Sales) for the purchase price. He further pled that he was asserting a lien over the vessel to secure that claim and that this was enforceable against the pursuers as creditors under the mortgage. The case came before Lord Malcolm for a debate.

### A. THE DOUBLE SALE

Before addressing the lien question, two comments may be made about the double sale scenario, beloved of academic property lawyers, although relatively rare in practice. The first is that normally where A sells a corporeal moveable to B, but retains possession, statute allows A to give a good title to C, despite ownership having transferred to B. C must be in good faith and without knowledge of the previous sale and there requires to be a delivery to him under a sale, pledge or other disposition. The provision is section 24 of the Sale of Goods Act 1979.<sup>3</sup> This, however, did not help Johnstone. As a preliminary point, he might not be regarded as being in good faith. The initial sale was published in the Registry of Shipping. At least in respect of land, there is a doctrine of deemed knowledge of the register,<sup>4</sup> which should perhaps apply here too.<sup>5</sup> This issue, however, was not addressed by the court. Even if he had been in good faith, his title was encumbered by the ship mortgage, as his counsel conceded. The reason is that section 24 deems the seller (A) to be the agent of the first purchaser (B). This lets title transfer to C.<sup>6</sup> The mortgage, however, remains in place. As a validly granted real right it is unaffected by the change of ownership. The property remains encumbered. A damages claim was thus available.<sup>7</sup>

The second point is that double sales may bring into play the so-called “rule against offside goals”.<sup>8</sup> Where A has agreed to sell to B and then sells to C, B may set aside the transfer to C if C is in bad faith. The rule, however, has no application here, because the transfer to B was complete before C even came into the picture.

<sup>2</sup> The decision does not disclose where the place of sale was, but it may be assumed to be England.

<sup>3</sup> In his judgment Lord Malcolm refers to “section 24 of the Sale of Goods Act 1893” by mistake. See [2007] CSOH 177 at para 7.

<sup>4</sup> The leading modern case is *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SC 74. See K G C Reid, *The Law of Property in Scotland* (1996) para 134.

<sup>5</sup> The general rule, however, is that actual notice of the prior sale is required. See P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods*, 11<sup>th</sup> edn (2005) 398-399.

<sup>6</sup> See D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2<sup>nd</sup> edn (2006) para 10.21.

<sup>7</sup> Sale of Goods Act 1979 s 12(2).

<sup>8</sup> Reid, *Property* (n 4) paras 695-700.

### B. SPECIAL LIEN, MUTUALITY AND DAMAGES

The basis of Johnstone's case was that he had a lien for damages enforceable against the pursuers. Scots law distinguishes between special liens, which secure the sum due under a particular contract or other obligation, and general liens, which secure the balance arising out of a number of contracts.<sup>9</sup> As Lord Malcolm pointed out, the lien here had to be special, because general liens are limited to recognised cases.<sup>10</sup> This was not one of them.

Lord Malcolm surveyed the authorities which establish that a special lien will arise in the context of mutual obligations under a contract. Many of these are judgments of Lord Young from the nineteenth century. A typical example is his statement in *Meikle & Wilson v Pollard*<sup>11</sup> that "lien" means "the right of certain parties to keep articles belonging to a person with whom they have contracted, until he has fulfilled his part of the contract".<sup>12</sup> This means almost always payment to the lien-holder.<sup>13</sup> The instant case was unusual. Johnstone was not waiting for performance – it would be impossible for him to be given an unencumbered title – but damages. Lord Malcolm refers to the English case of *The "Katingaki"*<sup>14</sup> where Brandon J stated that there was no possessory lien for contractual damages. English law here, however, rests on different principles. Lien is restricted to specific categories such as that of the carrier and the repairer, rather than being a general doctrine arising out of mutual obligations.<sup>15</sup>

Authority does exist in Scotland in favour of a lien for damages. In *Moore's Carving Machine Co v Austin*<sup>16</sup> a commission agent had been appointed by a company to sell carving machines. The company ran into difficulties and was unable to supply the agent with machines. The company was held to be in breach of contract. The agent could therefore retain the show machine which he had been given until he received damages. The case has been described as "new law".<sup>17</sup> A difficulty here is the mutuality principle. Can the obligation to pay damages really be said to be reciprocal to the obligation to hand back the property? It is submitted, however, that if the courts are willing to regard the obligation to perform as the counterpart to the duty to re-deliver, then the obligation to pay damages for non performance should be similarly treated.<sup>18</sup> Lord Malcolm did not express a view on this matter. Rather, his emphasis was on a material difference in the case he had to decide. Here, the party who contracted with the individual asserting the lien did not own the property.

9 See Bell, *Comm II*, 87; A J M Steven, *Pledge and Lien* (2008) chs 16 and 17.

10 [2007] CSOH 177 at para 4.

11 (1880) 8 R 69.

12 (1880) 8 R 69 at 71.

13 See, for example, *Robertson v Ross* (1887) 15 R 67 at 71 per Lord Young.

14 [1976] 2 Lloyd's Rep 372.

15 Steven, *Pledge and Lien* (n 9) para 16-11.

16 (1896) 33 SLR 613.

17 W M Gloag and J M Irvine, *Law of Rights in Security* (1897) 353, cited by Lord Malcolm at para 9.

18 See also Steven, *Pledge and Lien* (n 9) paras 16-20-16-23.

### C. NO TITLE, NO LIEN

Lien normally arises by operation of law, but shares a feature of consensual securities. It matters who delivered the property to the party claiming the lien. This must generally be the owner or an agent.<sup>19</sup> Thus Lord President Clyde stated in *Lamonby v Arthur G Foulds Ltd*:<sup>20</sup>

[I]n both pledge and lien the principle that the possessor of a moveable can give no better right therein or thereto to a third party than he has himself acquired from the owner applies, unless the owner has personally barred himself, by some actings of his own, from founding on the limited character of the title he actually gave to the possessor.

The approach of the courts can be seen to treat lien like pledge. Lord Malcolm's judgment is the most recent example. He states:<sup>21</sup>

[Johnstone] avers that he did not receive title to the vessel ... There is an inconsistency in simultaneously asserting that [the seller] could nonetheless give him a right to retain the vessel, in effect as pledge, pending compensation.

No valid lien was therefore held. Whether this approach is justified is open to question.<sup>22</sup> Lien should not be regarded as a form of pledge.<sup>23</sup> Nevertheless, the requirement for the person who contracted with the retaining party to be the owner of the property is probably too embedded to be changed. There are good policy reasons for the approach. It may be regarded as inequitable for the owner to be effectively liable for work which was instructed by a person possessing the property unless the owner has consented to that work. In South Africa, a similar approach is taken to liens arising under contract, but the possessor may retain the property if a claim lies in unjustified enrichment for work done to it.<sup>24</sup> There is no sign of Scots law developing in this way.

Lord Malcolm notes that "there are certain situations where the law does recognise a lien enforceable against a third party owner, for example a shipbuilder's or an innkeeper's lien".<sup>25</sup> The present writer is unsure of the authority for this proposition as regards shipbuilders.<sup>26</sup> For innkeepers, better termed now "hoteliers", a lien can be asserted in respect of property brought in by the guest which belongs to a third party.<sup>27</sup> But this rule is probably incompatible with article one of the first protocol to the European Convention on Human Rights because the property of one party

19 Steven, *Pledge and Lien* (n 9) paras 13-35-13-50.

20 1928 SC 89 at 95.

21 [2007] CSOH 177 at para 7.

22 A notable critic is W A Wilson, *The Law of Scotland on Debt*, 2<sup>nd</sup> edn (1991) para 7.8.

23 Steven, *Pledge and Lien* (n 9) ch 18.

24 G Pienaar and A J M Steven, "Rights in Security", in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758 at 778-783.

25 [2007] CSOH 177 at para 8.

26 It might be the English case of *Williams v Alsup* (1861) 30 LJCP 353 (discussed in Gloag and Irvine, *Rights in Security* (n 17) 295).

27 The leading modern case is *Bermans and Nathans Ltd v Weibye* 1983 SC 67.



should not be used to secure another's debts without consent.<sup>28</sup> Lord Malcolm also says that the "authorities describe [the exceptional cases] as general liens based on usage of trade or custom".<sup>29</sup> Both the liens of the shipbuilder and the hotelier are in fact special liens.<sup>30</sup>

#### D. LIEN AS A REAL RIGHT

The result reached by Lord Malcolm that no lien could be asserted is consistent with earlier authority that the owner or his or her agent, not a party who has no title to the goods, must contract with the lien-holder. His judgment is equivocal as to whether lien is a real right. A lien must be regarded as real if, once validly created, it binds third parties who subsequently acquire rights in relation to the property. When Johnstone's counsel referred to the fact that some cases involved a lien being effective against a trustee in sequestration rather than the original contracting party, Lord Malcolm stated that this was not of assistance. The position was simply that "the trustee stood in the shoes of the bankrupt, and thus was subject to all pleas available against the bankrupt".<sup>31</sup> This is not, however, the true reason why these liens were effective against the trustee. It is because lien is a real right.<sup>32</sup>

Lord Malcolm also states that for the lien to bind the creditors under the mortgage would require their express or implied consent.<sup>33</sup> At first sight this seems to deny that lien has real effect. The mortgage, however, was created as a real right first and therefore on the general principle of *prior tempore potior iure* is not subject to the lien unless the mortgagee agrees. The law on ranking of liens with other securities is, nevertheless, not a well developed and coherent area. At common law, the lien of a solicitor over title deeds was effective against the holder of a prior heritable security, but this heavily criticised rule was overturned by statute.<sup>34</sup> The earlier security should prevail and Lord Malcolm's approach here is surely correct. Consequently, the end result would have been the same if the lien had been valid rather than ineffective

28 See Steven, *Pledge and Lien* (n 9) para 16-83. A comparator is the third party effect of the landlord's hypothec, which was abolished by s 208(4) of the Bankruptcy and Diligence etc (Scotland) Act 2007.

29 [2007] CSOH 177 at para 8.

30 As regards the hotelier's lien the authorities are confused, but the lien is indeed special. See Steven, *Pledge and Lien* (n 9) paras 16-72-16-77.

31 [2007] CSOH 177 at para 7.

32 Reference may be made to Bell, *Comm II*, 86ff; Gloag and Irvine, *Rights in Security* (n 17) 8 and 359; Carey Miller with Irvine, *Corporeal Moveables* (n 6) para 11.19; G L Gretton, "The concept of security", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 145; and (amongst other judicial statements) *Harper v Faulds* (1791) Bell's Octavo Cases 440 at 472 per Lord President Campbell. The most notable dissentient is W W McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edn (2007) para 20-82. For a full discussion of the issue, see Steven, *Pledge and Lien* (n 9) ch 14.

33 [2007] CSOH 177 at para 8. He continued that alternatively the lien had to flow from "the principle of mutuality". Again, this is presumably mutuality with the creditors, rather than the sellers. But this is not entirely clear.

34 The case which established the rule was *Hamilton of Provenhall's Creditors* (1781) Mor 6,253. The decision apparently made Lord Justice-Clerk Macqueen's hair stand on end. See Bell, *Comm II*, 109. It was consigned to history by s 27 of the Conveyancing (Scotland) Act 1924.

because of the seller's lack of title. The claim that Johnstone had the right to retain possession from the mortgagees therefore well and truly missed the boat.

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## Intimation: 1862-2008

How do you intimate an assignation? The point is important because Scots law retains intimation as a constitutive requirement for transfer. Few other legal systems still do. In modern Scottish practice the standard method is for the assignee to send the debtor a notice signed by the cedent notifying the debtor of the assignation and instructing the debtor into which bank account payment should be made.<sup>1</sup> The notice is usually sent by recorded delivery post. The practice is, however, problematic. It does not comply with the Transmission of Moveable Property (Scotland) Act 1862. The 1862 Act allows intimation to be made by posting a certified true copy of the assignation to the debtor. The 1862 Act is, admittedly, permissive rather than prescriptive.<sup>2</sup> But there is no solid authority for the standard practice.<sup>3</sup> Factoring is more problematic still: the notices are usually stamped or docketed to invoices, often in barely legible font and in ambiguous terms.

In *Christie Owen & Davies plc t/a Christie & Co v Campbell*,<sup>4</sup> there was a poorly drafted assignation tucked away in the terms and conditions of a wider, informally executed, agreement. Unusually, the whole agreement was sent to the debtor, but the putative assignee made no mention of the assignation when it purported to intimate. The case turned on whether there had been an intimated assignation.

### A. THE DECISION

The facts of the *Christie* case were these. The pursuers (Christies) were selling agents involved in the sale of the first defender (Campbell)'s business. The second defenders

1 The notice purports to come from the cedent and, where the assignation is in security, usually instructs that payments should continue to be made to the cedent. The practice is inconsistent with the decision in *Hope and M'Caa v Wauch* 12 June 1816 FC.

2 Prior to the Transmission of Moveable Property (Scotland) Act 1862, conventional intimation of an assignation had to be notarial: the assignee's procurator, together with a notary (who had to be a different person from the procurator), would seek out the debtor and, in the presence of two witnesses, perform the customary notarial rituals. At that time, intimation of an assignation was indeed intimate. The 1862 Act arrived to obviate *notarial* intimation. Notarial intimation, though obsolete, remains competent.

3 It might be argued that the notice is nevertheless effective because (i) it is signed by the cedent (ii) it details what has been signed (iii) it provides the debtor with clear instructions where to pay and (iv) the assignee serves the notice; and (v) service is certain because it is effected by recorded delivery. But these are arguments; the point has never been decided.

4 Case no CA161/07, Glasgow Sheriff Court, 21 June 2007, Sheriff A F Deutsch, noted at 2007 GWD 24-397 affd 18 Dec 2007, Sheriff Principal J A Taylor (henceforth the *Christie* case).

were a firm of solicitors. Following the sale of Campbell's business, or at least an assignation of a lease, Christies became entitled to commission under a Sole Selling Rights Agreement ("SSRA").<sup>5</sup> The solicitors held the proceeds. Christies argued that the solicitors were liable to pay to Christies the commission Christies had earned. This obligation was based on a mandate granted by Campbell to Christies in the body of the SSRA:

... I/we hereby authorise the vendor's solicitors... to pay out of money received by such solicitors, the fees requested by [the pursuers] ...

Both the sheriff and the sheriff principal found that such an instruction was capable of amounting to an assignation.<sup>6</sup> (The soundness of that assumption may be doubted. There are important differences between mandates to pay, mandates *in rem suam* and assignations).<sup>7</sup> Christies alleged that they had sent the solicitors a copy of the SSRA and that this was enough to amount to intimation of the assignation. The solicitors refused to pay.<sup>8</sup> Sheriff Deutsch produced a detailed note, most of marginal relevance to the case before him.<sup>9</sup> But his decision was correct: Christies averments of an intimated assignation were insufficient and the case irrelevant. The sheriff principal agreed. Both opinions contain a number of points of interest.

## B. INTIMATION

Intimation in Scots law has at least two purposes: (i) to provide a certain date of transfer; and (ii) to "interpel" the debtor, i.e. to inform the debtor that payment must now be made to the assignee.<sup>10</sup> Often these two functions are satisfied simultaneously. But it is not always so: (i) can occur without (ii) and (ii) can occur without (i). It is, for instance, possible to intimate an assignation in terms of the 1862 Act by recorded delivery post. The date of transfer is the presumed date of delivery of the intimation to the debtor.<sup>11</sup> And the date of transfer is thus fixed irrespective of whether the *debtor cessus* has actually received or read the intimation.<sup>12</sup> The assignee is, on intimation,

5 Conveyancers, working for impossibly low fixed-fees, should take note: the consideration for the assignation of the lease was £46,000. The commission £9,360.05. See para 2 of the sheriff principal's note.

6 See Sheriff Deutsch's note at para 12; Sheriff Principal Taylor's note at paras 4 and 7.

7 See G L Gretton, "Mandates and Assignations" (1994) 39 JLSS 175 and R G Anderson, *Assignation* (2008) paras 3-14 ff.

8 Why the solicitors refused is not clear. If Campbell was asserting an entitlement to the commission, the solicitors could, in principle, have raised a multiplepounding, leaving Campbell and Christies to fight it out. There does not seem to be any reason in principle why the solicitors – the real raisers – could not also represent one of the claimants (Campbell) in the competition.

9 Sheriff Deutsch is interested in this area of the law: see his review of the third edition of F Salinger, *Factoring: The Law and Practice of Invoice Finance* (1999) at 47 (2002) JLSS Jan/44.

10 Another important purpose of intimation is to provide the cut-off date for those defences held against the cedent that the debtor may raise against the assignee.

11 Although, for assignations in security, the Registrar of Companies deems the date of posting to be the date of "creation" of a charge for the purposes of s 410 of the Companies Act 1985.

12 The only reported case covering this set of facts appears to be *Hume v Hume* (1632) Mor 848.

no longer subject to the cedent's creditors, although the debtor may still pay in good faith to the cedent until the debtor actually becomes aware of the assignment.

These basic underlying functions of intimation were not considered in the *Christie* case. Ironically, in the *Christie* case, the intimation was unusually formal since a full copy of the SSRA was actually sent with the purported intimation letter.<sup>13</sup> Yet the sheriff assumed that the intimation was informal and he embarked on a detailed search for support for informal intimation. The sheriff eventually found support for informal intimation in two cases decided under the pre-1862 law: *Carter v McIntosh*<sup>14</sup> and *Donaldson v Ord*.<sup>15</sup> At the time these cases were decided, conventional intimation had to be notarial. Any attempt to find support for informal intimation in these cases is not just strained but a search for the non-existent. Before the sheriff principal, the agents agreed that the test to be applied to whether there was intimation was that formulated by Lord Kincaid in *Libertas-Kommerz v Johnson*:<sup>16</sup>

... if there has been a written intimation to the debtor of the fact that an assignment has been granted, the terms of that intimation must be considered, and if they are such, on a reasonable interpretation, as to convey to the debtor that the debt has been transferred, and that the transferee is asserting his claim to the debt from the debtor, intimation will be held to be effectual.

The sheriff principal highlighted that there were two aspects to this test: first, the intimation must, on a reasonable interpretation, tell the reader that the debt has been transferred. Second, the transferee must assert his entitlement to payment.

Something should be said about the circumstances of the *Libertas-Kommerz* case. Lord Kincaid's test is not authoritative because in the *Libertas-Kommerz* case itself, counsel agreed the test.<sup>17</sup> The point was not the subject of debate, far less judicial consideration. It is for this reason that the case is of no value as an authority on this point. The eminence of the counsel involved (now Lords Hope and Penrose) has given credence to the view that the concession was well made. But law reports do not disclose the various motives in the name of which good arguments may be sacrificed. Moreover, as in *Christie*, there was, in *Libertas-Kommerz*, no true competition. The case involved the assignment of a claim secured by a floating charge. The original holder did not dispute the alleged assignments (made under German law). The liquidator did not dispute the existence of the floating charge. The question was solely whether the assignee was entitled to the charge. There were no antagonistic claims; rather the liquidator wanted to ensure that the creditor claiming in the liquidation was entitled to be paid. So the point remains for both discussion and decision whether the *Libertas-Kommerz* test is the correct one.

The test seems sensible enough. On the facts of the *Christie* case, the sheriff principal helpfully points out that covering letters enclosing intimations should be

13 See para 6. In the sheriff principal's view, the defect in intimation lay in the covering letter: see para 7.

14 (1862) 24 D 925.

15 (1855) 17 D 1053.

16 1977 SC 191.

17 1977 SC 191 at 205.

unambiguous, something not mentioned in the 1862 Act. Complying literally with the terms of the 1862 Act is not enough: the assignation may be tucked away in the depths of 100-page document. The assignee must therefore communicate his purpose.

The *Libertas-Kommerz* test, however, is not a particularly helpful basis for the substantive law of intimation. The test addresses only the second function of intimation, namely, to inform the debtor. In both *Libertas-Kommerz* and *Christie* there was no competition and the question was between debtor and assignee. In *Christie*, agents' submissions before the sheriff principal proceeded on the understanding that the case turned on whether the debtor had actually read, or could be deemed to have read, the intimation. And where there are no competitors that might be a proper approach. But such a test says nothing about the first and primary role of intimation which is to establish a date of transfer.

Under the *Libertas-Kommerz* test, there is little indication when transfer actually occurs. Presumably it is only when the debtor actually reads, or at least actually receives and ought to have read, the intimation. Yet, if transfer were to occur only when the debtor reads the intimation, the Scots law of assignation would become completely unworkable. The assignee would now have absolutely no control over the date of transfer. As a result, the assignee would never be able to rely on an assignation intimated by recorded delivery post (or, for that matter, even an intimation served by a court officer in the presence of a witness) providing insolvency protection against the cedent's creditors. For there is never any guarantee that the debtor has received, far less read, the intimation. No one, not even a King – as the congregation at the High Kirk of Edinburgh so decisively showed Charles I<sup>18</sup> – can make anyone read anything.

All transfers, whether of real rights or personal rights or intellectual property rights, require certainty. The justification for formal intimation rules is that, for all they may appear cumbersome, they provide certainty. Neither the sheriff's nor the sheriff principal's opinion in the *Christie* case, however, considers the primary function of intimation, namely, provision of a certain date of transfer. The second function, of information, is actually of lesser importance: for the ignorant debtor who pays the wrong person through no fault of his own is always protected.<sup>19</sup> So although the sheriff and sheriff principal therefore reached the correct decision on the facts of the case, much of their reasoning sheds little light on the general law.

### C. THE DEBTOR

The sheriff held that the requirement of an acknowledgment, where intimation was otherwise informal, was impractical:<sup>20</sup>

<sup>18</sup> On 23 July 1637.

<sup>19</sup> Stair, *Inst* 1.18.3 and 4.40.33; Erskine, *Inst* 3.4.3. There is statutory protection for foreign arrestees: Debts Securities (Scotland) Act 1856 s 1. Good faith payment will be disastrous for the assignee whose claim is destroyed (although he will have a warrantee claim against the cedent); hence the practical importance of intimation in all legal systems.

<sup>20</sup> Para 27 of the sheriff's note.

An agreement to be bound by a notice of assignation is only likely ever to be granted where the debtor has no beneficial interest in the funds but holds them to the order of the cedent, as in the case of the solicitor holding the proceeds of sale in a conveyancing transaction.

This statement betrays a misunderstanding of the law. Subject to the terms of the underlying contract, the debtor who receives an intimation is never obliged to grant an acknowledgement. This has nothing to do with “beneficial interests” in the “funds”. The paradigm assignation is of a claim that the cedent holds against the *debitor cessus*. The debtor in an obligation can never be described as having a “beneficial interest” in his own *liability*. The debtor has an “interest”, of course, in paying only to a person who can grant him a discharge. Usually this is his original creditor or an assignee who has properly intimated. But whether this is what the sheriff intended by “beneficial interest” is not clear. In any event, a debtor who pays in good faith to the person he takes to be his creditor is protected. References to “funds”, meanwhile, tend to confuse. Unless there is a competition relating to a pile of coins and banknotes (an unlikely scenario) all references to “funds” or “moneys” are metaphorical. The true question is one of liability: how much is owed and, importantly, to whom.

#### D. CONCLUSIONS

The *Christie* case involved a quite unsatisfactory mandate to pay in the context of a conveyancing transaction. The sheriff and sheriff principal rightly held it could not operate as an assignation. The sheriff’s detailed discussion of informal intimation in factoring transactions, although interesting, had nothing to do with the case. As in *Libertas-Kommerz*, the issue arose because of a plea of no title to sue. But it is settled law that the holder of an unintimated assignation has a title to sue: the raising of the action is itself intimation.<sup>21</sup>

For some,<sup>22</sup> the Scots law of intimation appears archaic. Often, however, it is with practitioners rather than with the law where old habits die hard. Scots law has sanctioned outright assignations for over half a millennium. Why commercial lawyers continue to appoint procurators *in rem suam*, mandatories or attorneys is quite extraordinary. Some of the ambiguities that arose in the *Christie* case could have been avoided by better drafting: a conveyance with a single sentence specifying what the granter “HEREBY ASSIGNS” instead of the rather timid payment authorisation tucked away in the terms and conditions of an informally executed contract.

The *Christie* case was clearly correct on the facts. The more general statements of law, however, particularly in the sheriff’s note, should not be followed. In a case

21 The most recent discussion of the point is in *Laurence McIntosh Limited v Balfour Beatty Group Limited* [2006] CSOH 197. See too *Tayplan Limited v D & A Contracts* 2005 SLT 195 and *Slattadale v Tilbury Homes Limited* 1997 SLT 197. The same issue arose in *Libertas-Kommerz*, a note of appeal from an adjudication and deliverance of the liquidator, where counsel (Mr Hope) offered to produce the assignations in process: art 9 of the condensation, 1977 SC 191 at 196.

22 R B Wood, “Special considerations for Scotland”, in N Ruddy, S Mills and N Davidson, *Salinger on Factoring: the Law and Practice of Invoice Finance*, 4<sup>th</sup> edn (2006) para 7.36 ff. As W W McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edn (2007) para 12-95 n 325 points out, this passage “ignores much inconvenient authority”.

involving a genuine competition, it is difficult to see how the *Libertas-Kommerz* test can provide any assistance. So it may be doubted whether Scots law, in 2008, recognises informal intimation as effective without acknowledgement. The *Christie* case holds that covering letters must make state the purpose of the enclosures. The case has little to say about the fundamental role of intimation in Scots law, which is to establish a date of transfer.

To determine whether intimation has been validly made, two issues must be addressed: (i) whether there is a certain date of transfer and (ii) the content of the notice. *Christie* dealt with covering letters, which goes to (ii).<sup>23</sup> Unfortunately there remains no clear authority for when intimation occurs where, for example, notices are lost but there is proof of posting; and how that proof would be dealt with on competition, such as with an arrester. To satisfy (i), anything short of recorded delivery post is unlikely to be sufficient. Importantly, it must be recognised that there is little to be gained from trudging through old authorities for support for informal intimation. No support can be found for informal intimation in these cases. Scots law could, of course, survive without formal intimation. But an alternative method of ensuring that the transfer has a certain date will have to be found.<sup>24</sup> That is the challenge.

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## Lien as an Excludable and Equitable Right

*Onyvax Ltd v Endpoint Research (UK) Ltd*<sup>1</sup> is the second Court of Session decision on lien in as many months.<sup>2</sup> The pursuers had contracted with the defenders to carry out clinical trial work in relation to the development of a new cancer vaccine. The contract was subsequently terminated. The pursuers sought delivery of a document produced by the defenders containing details of the work. In response, the defenders asserted a lien over the document on the basis that they were still owed £147,267.70

23 For an old case, see *Lawrie v Hay* (1696) Mor 849 where the content of the notice was sufficient to interpell the debtor, but insufficient to prevail in a competition.

24 In other systems, where notice is not a constitutive requirement, such as Germany, certainty is achieved by notarial execution of the transfer agreement. One solution in Scotland would be to reverse *Tod's Tr v Wilson* (1869) 7 M 1100, and hold that an assignation that has been executed before a notary and registered in the Books of Council and Session, say, within 21 days of its date, divests the cedent from the date of the deed, although the debtor who pays the wrong person in good faith is protected. Intimation will still occur, but only because of the need to interpell the debtor.

1 [2007] CSOH 211.

2 The first was *Air and General Finance Ltd v RYB Marine Ltd* [2007] CSOH 177, for which see 270 above. The most recent previous reported decision on lien was *Goudie v Mulholland* 2000 SC 61. See also *Thomson Pettie Tube Products Ltd v Hogg*, CSOH 4 May 2001.

under the contract. The pursuers enrolled a motion for an *interim* order for delivery,<sup>3</sup> asserting that they were being prevented from developing the vaccine. A number of arguments were made by both parties to the Outer House judge, Lord Emslie. Only two are considered here. First, the pursuers averred that the assertion of a lien was inconsistent with the express conditions of the contract. Secondly, they submitted that because lien is an equitable remedy, the court could not uphold it if the equities were in favour of the pursuers.<sup>4</sup>

### A. EXCLUDING LIEN

It is well established that the contract under which the property is held can prevent a lien from arising.<sup>5</sup> In *Crawfurd v Hodge*<sup>6</sup> a law agent borrowed title deeds from another law agent, signing the following receipt: “Borrowed from Mr Hodge, writer, titles of property belonging to Mr A Wallace, sixteen in number, which I oblige myself to return on demand”. It was held that this entitled Mr Hodge to immediate redelivery of the deeds on request. The relevant parts of the contract in the present case were:

- 8.1 All Intellectual Property and work product generated in any form or media in the course of the performance of the Services by Endpoint ... is the sole and exclusive property of Onyvax and shall be remitted by Endpoint to Onyvax no later than the termination date of this Agreement.
- 12.3 Upon request of Onyvax and/or at the end of the work covered by this Agreement, Endpoint will promptly return all documents and information made available to Endpoint and created by Endpoint during the course of the work carried by this Agreement.

In addition, reference was made to the Declaration of Helsinki (1964) which had been incorporated into the contract and under which “considerations related to the well-being of the human subject should take precedence over the interests of science and society”.<sup>7</sup> Lord Emslie took the view, however, that the lien being asserted was “not necessarily inconsistent”<sup>8</sup> with the express terms of the contract. He noted that there was no explicit exclusion of lien. Nor was he persuaded that the incorporation of the principle of patient safety impliedly excluded a lien from being asserted. The result is apparently a stricter approach than in *Crawfurd* where the obligation to return on demand prevailed. In fact the borrower did not actually assert a lien there and so the cases are not identical. But the result of Lord Emslie’s approach is that an express obligation to return upon request/demand<sup>9</sup> is probably insufficient to exclude a lien.

3 In terms of s 47(2) of the Court of Session Act 1988.

4 See [2007] CSOH 211 at para 3.

5 For the authorities, see A J M Steven, *Pledge and Lien* (2008) para 11-17.

6 (1831) 10 S 11.

7 [2007] CSOH 211 at para 4. On the Declaration of Helsinki, see J K Mason and G T Laurie, *Mason and McCall Smith’s Law and Medical Ethics*, 7<sup>th</sup> edn (2006) para 18.2.

8 [2007] CSOH 211 at para 17.

9 One might, however, draw a distinction between “request” as per clause 12.3 and “demand”.



Of course, this will depend upon an interpretation of the contract as a whole. The only safe advice to those drafting commercial contracts with an intention to exclude lien is to include an express provision to that effect.<sup>10</sup>

## B. THE EQUITABLE NATURE OF LIEN

The fact that lien is an equitable right subject to judicial control is also well settled.<sup>11</sup> Perhaps the leading case is *Garscadden v Ardrossan Dry Dock Co Ltd*.<sup>12</sup> There a shipbuilding company exercised a lien over a vessel for repairs. A dispute, however, arose with the owner over the amount due. He raised an action for delivery of the ship. The court ordered the shipbuilders to release it on him consigning the balance of the account due in court. Lord Ardwall stated that it was “plainly undesirable that this ship should be detained longer in the dock than is necessary”.<sup>13</sup> The value of the ship was far in excess of the debt. Lord Emslie followed *Garscadden* in the present case and made an *interim* order requiring the document to be released on condition of the whole amount due being consigned. He was persuaded by a number of factors. The first and probably principal one was patient safety.<sup>14</sup> The pursuers needed the document to continue safe development of the vaccine. Giving weight to this factor seems entirely justifiable. A far less convincing factor was that the document apparently had only value to the defenders as “a lever or bargaining counter”<sup>15</sup> for payment. But this is the normal position.<sup>16</sup> The property is of value to the debtor and not the lien-holder. It should not be a ground for the court to intervene.

Also questionable is Lord Emslie’s statement on the nature of lien:<sup>17</sup>

[T]he lien which the defenders assert is founded on the principle of mutuality of obligations, and in that respect is similar to the contractual right of retention which the defenders might have asserted in other circumstances. The key difference here, however, is that whereas retention would have been a legal right, the defenders’ lien is in the nature of an equitable claim subject to the scrutiny and control of the court.

The idea that retention is a legal right and lien is an equitable one has echoes of the law and equity distinction of English law which is not recognised in Scotland. Rather, the true position is that lien – or, more accurately, special lien – arises under

10 For an example of such a clause, see the photocopier hire contract in *Eurocopy (Scotland) plc v Lothian Health Board* 1995 SC 564 in terms of which the hiree was expressly barred from permitting the creation of a lien over the machine.

11 Steven, *Pledge and Lien* (n 5) paras 15-04-15-07.

12 1910 SC 178.

13 1910 SC 178 at 180.

14 [2007] CSOH 211 at para 18.

15 Para 18.

16 At least for documents. Marketable property such as a vehicle does have a value to the lien-holder because application may be made to the court to sell the item if the debtor is unable to pay. See Steven, *Pledge and Lien* (n 5) para 15-02.

17 Para 16.

the contractual remedy of retention. It does so just like the right to retain debts, or the specific example of the right to retain rent when the landlord is in breach of the terms of the lease.<sup>18</sup> As Gloag points out, the right of the court to intervene on equitable grounds is a general doctrine of the law of retention.<sup>19</sup> It is not restricted to lien. Other cases of retention for breach of contract are therefore open to judicial control too.

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## Interpretation, Implied Terms and Interference with Conditions

The decision of Lord Reed in *Credential Bath Street Ltd v Venture Investment Placement Ltd*<sup>1</sup> turned on (1) the interpretation of expressions used in a contractual guarantee of a tenant's obligations under a lease, (2) the interpretation of a unilateral juridical act by the landlord relating to those obligations, (3) the possible introduction of an implied term into the guarantee and (4) the possible application of the rule that, if a party who stands to gain from the non-fulfilment of a condition interferes improperly with the situation so as to prevent that fulfilment, the condition may be regarded as fulfilled.

### A. INTERPRETATION OF CONTRACTS

The guarantor was liable only if there was a non-performance by the tenant of certain obligations under the lease and a demand on the guarantor by the landlord. The guarantee was to last only for a specified period. After the expiry of that period there was to be no liability under the guarantee except in relation to "any antecedent breach of the *Guarantee*".<sup>2</sup> The landlords argued that this should be read as meaning any relevant antecedent breach of the *lease* (or a related payment agreement) by the tenant. In the events which happened, the tenant did fail to perform relevant obligations under the lease within the specified period but no demand was made to the guarantor by the landlords within that period. Lord Reed held that the expression meant what it said. The guarantor had not failed to

<sup>18</sup> See generally, W M Gloag, *The Law of Contract*, 2<sup>nd</sup> edn (1929) 523-644 and W W McBryde, *The Law of Contract in Scotland*, 3<sup>rd</sup> edn (2007) paras 20-62-20-87. This is not to say that lien does not have special features, such as the fact it is a real right. See Steven, *Pledge and Lien* (n 5) ch 14.

<sup>19</sup> Gloag, *Contract* 627.

<sup>1</sup> [2007] CSOH 208.

<sup>2</sup> Para 6.

perform any obligation under the guarantee prior to the end of the specified period as the conditions required for such an obligation to arise had not been fulfilled.

The interest of this part of the case lies in the route which Lord Reed took to reach this decision. He did not simply take the view that a literal approach had to be followed – that “guarantee” meant “guarantee” and that was an end of it. He accepted that a court can ascribe to an expression the meaning which it would convey to a reasonable person aware of the documentary context of the words, the nature and purpose of the contract and the factual background, notwithstanding that this meaning differed from the literal meaning of the words used.<sup>3</sup> In the present case it would therefore have been possible to conclude that a reasonable person, taking account of the whole context, would have read “any antecedent breach of the guarantee” (by the guarantor) as having been intended to mean “any relevant antecedent breach of the lease” (by the tenant). However, having taken account in particular of the fact that the interpretation argued for by the landlords did not work in the context of the whole document and that the ordinary meaning of the expression used was not inconsistent with the commercial purpose of the guarantee, Lord Reed concluded that the ordinary meaning should prevail.<sup>4</sup>

This part of the case is a very welcome addition to the line of authorities which have moved the approach of United Kingdom courts to the interpretation of contracts away from an apparent concentration on the literal meaning of words towards a more principled approach which is more in line with the way in which expressions are interpreted in ordinary life.<sup>5</sup> The word “apparent” is used because, in spite of frequent statements of a golden rule to the effect that ordinary words must be given their natural and ordinary meanings, there were always, as Lord Reed notes in the case,<sup>6</sup> ways in which the courts could give effect to what was obviously the common intention of the parties even where this departed from the literal sense of the words used. This approach is in line with the approach adopted in the recently published *Principles, Definitions and Model Rules of European Private Law*.<sup>7</sup>

Sometimes the meaning which a reasonable person, aware of the whole relevant context, would give to an expression would require some extra words to be read into it. There was some discussion in the case whether, before this could be done, a court would have to be convinced that certain specific words had been omitted or whether it would be enough to be satisfied as to the general gist of what had to be supplied. Lord Reed favoured the latter view,<sup>8</sup> and this indeed seems more

<sup>3</sup> Paras 14-28.

<sup>4</sup> Paras 29-39.

<sup>5</sup> See e.g. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Macdonald Estates plc v Regensis (2005) Dunfermline Ltd* 2007 SLT 791.

<sup>6</sup> *Credential* at paras 19-20.

<sup>7</sup> C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law*, Draft Common Frame of Reference: interim outline edition (2008; available at [www.law-net.eu](http://www.law-net.eu) or [www.zerp.uni-bremen.de/deutsch/pdf/tom\\_draftCFRjan2008.pdf](http://www.zerp.uni-bremen.de/deutsch/pdf/tom_draftCFRjan2008.pdf)) art II-8:101.

<sup>8</sup> *Credential* at paras 27-28.

consistent with the general contextual approach now taken to the interpretation of contractual expressions.

One other point should be noted on this part of the case. Lord Reed noted that some traditional canons of construction such as the *contra proferentem* rule might have to be reconsidered or reformulated in the light of the new approach to interpretation now being adopted.<sup>9</sup> This is true, but it would be a pity to throw the baby out with the bathwater. The *contra proferentem* rule still has a valuable subsidiary role to play where there is an unresolvable doubt about the meaning of a contract term which has not been individually negotiated.<sup>10</sup> In a case like the present, where the term was apparently individually negotiated, and where in any event it was possible to arrive at the meaning of the words without resort to supplementary rules, it was rightly left out of account.

### B. INTERPRETATION OF UNILATERAL JURIDICAL ACT

In the interpretation of a contract the common intention of the parties can be a guiding principle although, as there may be no common intention as to the meaning of an expression and as there will only rarely be admissible direct evidence of this intention even where it did exist, this guiding principle is often not helpful. Generally, as here, the focus has to shift immediately to what a reasonable person, aware of the whole context, would have regarded the relevant expression as meaning. In the case of a unilateral juridical act, such as a notice intended to trigger some legal effect, it is not reasonable to use the intention of the person giving the notice even as a background guiding principle. If obvious risks of injustice are to be avoided the interpretation has to be objective from the start. The search is for the meaning which a reasonable recipient would give to the notice or other unilateral juridical act.<sup>11</sup> This well-established rule was applied in the present case. The landlords argued that a letter sent by them to the guarantor enclosing a schedule of dilapidations requiring to be attended to by the tenants should be interpreted as a demand for performance under the guarantee. Lord Reed held that no reasonable recipient would have interpreted it as such a demand.<sup>12</sup> Again, it is interesting to note that this approach to the interpretation of unilateral juridical acts is in line with the approach set out in the *Principles, Definitions and Model Rules of European Private Law*, which state that “[a] unilateral juridical act is to be interpreted in the way in which it could reasonably be expected to be understood by the person to whom it is addressed”.<sup>13</sup>

### C. IMPLIED TERMS

The implication of a term into a contract is a different process from the interpretation of a term which is already there. In the present case the issue of an implied term arose because there was a provision in the guarantee to the effect that if the tenant company

<sup>9</sup> Para 38.

<sup>10</sup> See *Principles* art II-8:103.

<sup>11</sup> *Credential* at paras 45-47.

<sup>12</sup> Paras 48-50.

<sup>13</sup> *Principles* art II-8:201(1).

was wound up within the period of the guarantee the guarantor would step into the tenant's position. The tenant company was not wound up within the specified period although proceedings for winding up had commenced within that period and were continuing at its end. The landlords argued that the guarantor had brought about delays in the proceedings so as to prevent the winding up being completed within the period and that there should be implied into the contract a term to the effect that "the [guarantor] would not cause [the tenant] to oppose any motion for its winding up when it knew or ought reasonably to have known that the opposition was unjustified either in law or in fact (or in both)".<sup>14</sup>

Referring to *Equitable Life Assurance Society v Hyman*<sup>15</sup> and other cases, Lord Reed noted that implying a term into a carefully drawn up contract to fill a gap for which the parties had inadvertently not provided would be justified only in cases of necessity and only if certain other requirements were satisfied.<sup>16</sup> These other requirements are variously expressed in the cases but are meant to ensure that the implication is consistent with the parties' presumed intention. The implied term, for example, should not be unreasonable or inequitable, should not be incapable of clear expression and should not be contrary to the express terms. The test of necessity is a practical one rather than a logical one. As Lord Reed put it, "[t]he term sought to be implied must therefore be one which is necessary, in addition to the express terms, in order to make the contract work as the parties can be taken to have intended".<sup>17</sup> In the present case Lord Reed held that the requirements for implying the term proposed by the landlords were not satisfied.<sup>18</sup> Again, it is interesting to note that the approach to the implication of a term to provide for a matter which the parties have not expressly or tacitly provided for is similar under article II-9:101(2)-(4) of the *Principles, Definitions and Model Rules of European Private Law*. In particular, the implication of such a term is possible only where this is necessary (paragraph (2)) and any term implied should be such as to give effect to what the parties, had they provided for the matter, would probably have agreed (paragraph (3)).

It is clearly correct that the courts should be reluctant to imply terms into formal contracts – as opposed to informal contracts, such as taking a taxi, where there should be no reluctance at all to conclude that a lot of terms have been tacitly agreed. And it is difficult to argue with the way in which the law on implied terms was applied in this case. Nonetheless, this part of the decision leaves the reader with an uneasy impression that something is not quite right. Suppose that the guarantors had in fact, contrary to good faith and fair dealing, taken entirely improper steps to prolong the winding up proceedings so as to prevent the condition being fulfilled. Should there not have been some remedy? In this case, for various reasons, including the facts that the winding up proceedings were within the control of a court and that the legal representatives in the proceedings had professional responsibilities, it seems unlikely

<sup>14</sup> Para 52.

<sup>15</sup> [2002] 1 AC 408.

<sup>16</sup> *Credential* at paras 53-59.

<sup>17</sup> Para 58.

<sup>18</sup> Paras 60-71.

that anything improper or contrary to good faith and fair dealing would have been established, but the closing off of a *possible* remedy is worrying.

The cause of the unease is the extent to which Scottish (and English) lawyers are forced to rely on the difficult and uncertain process of the *ad hoc* implication of terms to deal with problems which would be better dealt with by general rules and which in most other European legal systems would be dealt with by that means. Curiously, there was a general rule which might have provided a solution in this case but which, although mentioned, was not fully explored. That brings us to the final point.

#### D. IMPROPERLY PREVENTING FULFILMENT OF CONDITION

In many European systems there is a rule that a party who stands to lose by the fulfilment of a condition, and who improperly interferes with the situation so as to prevent its fulfilment, may find that the condition is held to be fulfilled. It works the other way too if a party who stands to benefit from the fulfilment of a condition improperly brings about its fulfilment. In the *Principles, Definitions and Model Rules of European Private Law* this rule is expressed as follows:<sup>19</sup>

When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with a condition so as to bring about its fulfilment or non-fulfilment to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.

The rule is part of Scottish law.<sup>20</sup> It is expressed in Bell's Principles as being to the effect that "[i]f the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished".<sup>21</sup> Here Lord Reed referred to Bell's formulation and said that it "would not apply in the circumstances of the present case, since it could on any view be proper in some circumstances for the defenders to 'impede or prevent' their subsidiary's liquidation, for example by enabling it to pay creditors or to oppose an unjustified petition for winding up".<sup>22</sup> That, however, is to discard the underlying rule of the Scottish common law because Bell's statement of it was too unqualified – actually, too widely applicable rather than inapplicable. Bell's statement was not a legislative text. It was the author's attempt to state an old rule of the Scottish common law. Such attempts often have to be refined and qualified if the statements seem to be too sweeping in the light of experience and new cases. If the rule had been reformulated slightly it could have been held to be not only applicable (as it was) but also appropriate (which, on Bell's formulation, it was not). That would probably not have changed the result because, as noted above, it is unlikely that the guarantors did act improperly (or contrary to good faith and fair dealing or any obligation to co-operate) but it would have left the reader with the

<sup>19</sup> *Principles* art III-1:106(4).

<sup>20</sup> See *Mackay v Dick & Stevenson* (1881) 8 R (HL) 37 at 45, where Lord Watson noted that the rule was "borrowed from the civil law". The rule is discussed in J Murray, "Potestative conditions" 1991 SLT (News) 185 and A F Rodger, "Potestative conditions" 1991 SLT (News) 253.

<sup>21</sup> Bell, *Prin* § 50.

<sup>22</sup> *Credential* at para 61.

reassurance that there was at least a rule which could enable justice to be done in appropriate cases.

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## Unnecessary and Misconceived: Some Reflections on the Judiciary and Courts (Scotland) Bill

### A. INTRODUCTION

It is difficult to understand the point of this Bill.<sup>1</sup> Much of it is unnecessary; some misconceived. If enacted, it will do little good; it may well do some harm. Sadly, it seems to have been prepared with scant regard to the history, traditions and ethos of the Scottish judicial system. The *Policy Memorandum* and *Explanatory Notes* fail to disclose the real background to those of the provisions that are genuinely new.

The Scottish Executive's first "consultation" paper,<sup>2</sup> foreshadowing this Bill, is silent about the true origins of the underlying decisions taken before the "consultation" process began. These were decisions about remedying supposed weaknesses in the existing constitutional basis of judicial independence, about the need to "modernise" aspects of the judiciary, about following the English in creating a new statutory creature entitled "Head of the (Scottish) Judiciary" and about new systems for investigating and dealing with any allegedly unsatisfactory conduct by judges.

Consider the provenance of the provisions contained in Part 1, and Chapters 1 and 2 of Part 2, of this Bill. It derives from one of the most remarkable events in modern constitutional history.

On 12 June 2003, Downing Street, without previous consultation or announcement to Parliament, issued a press notice saying that the office of Lord Chancellor had been abolished.<sup>3</sup> The Lord Chancellor,<sup>4</sup> the fourth-ranked member of the Cabinet, had left the Government and some of his responsibilities were to be transferred to Lord Falconer of Thoroton. Given a new title, "Secretary of State for Constitutional Affairs", he entered the Cabinet as its most junior member. The details of the surrounding events are a matter for historians; but it is understood that the then Home Secretary<sup>5</sup> had insisted on including in his Asylum and Immigration Bill an "ouster" clause, excluding the jurisdiction of the courts in asylum appeals.

1 SP Bill 6, Session 3 (2008), available at [www.scottish.parliament.uk/s3/bills/06-JudiciaryCourts/](http://www.scottish.parliament.uk/s3/bills/06-JudiciaryCourts/).

2 Scottish Executive, *Strengthening Judicial Independence in a Modern Scotland* (2006), available at [www.scotland.gov.uk/Publications/2006/01/30154152/0](http://www.scotland.gov.uk/Publications/2006/01/30154152/0).

3 See "Briefing from the Prime Minister's Official Spokesman on: Reshuffle", 12 June 2003, available at [www.number-10.gov.uk/output/Page3895.asp](http://www.number-10.gov.uk/output/Page3895.asp).

4 Lord Irvine of Lairg.

5 David Blunkett MP.

Lord Irvine, arguing that such a provision would be an unacceptable violation of the rule of law, in effect said, “Over my dead body!”. The Prime Minister sided with the Home Secretary.<sup>6</sup>

Instead of announcing that the Lord Chancellor had been removed for defending the rule of law, it was asserted that the role of Lord Chancellor had become an unacceptable constitutional anomaly: the message was that “modernisation” had suddenly become compellingly urgent, following the incorporation into UK law by the Human Rights Act 1998<sup>7</sup> of the 50-year old European Convention on Human Rights. Initially the authors of the announcement failed to appreciate that the 800-year-old office of Lord Chancellor could not be abolished by an informal briefing to the press, not least because the Lord Chancellor had unique statutory responsibilities under nearly 400 Acts of Parliament, was Speaker of the House of Lords, and was alone responsible for appointing many office holders in England and Wales<sup>8</sup>, including judges.<sup>9</sup>

Soon, however, it was embarrassingly realised that the Lord Chancellor, as well as being a member of the Cabinet, was head of the judiciary in England: accordingly if the office were to be abolished and the functions transferred to a purely political minister<sup>10</sup> then somebody else would have to fill this vacant post, and a new system created to appoint judges. That realisation led to urgent and secret discussions with Lord Woolf, the Lord Chief Justice, resulting, in January 2004, in a “Concordat” between Lord Woolf and Lord Falconer. The Concordat governed some 700 matters affected by the changes. Lord Howe of Aberavon said of the original announcements, “[t]he overwhelming fact is that this package of proposals, whatever their intrinsic merits, arrives in the form of a pre-emptive bunch of products, produced as a mismanaged political change of governance”.<sup>11</sup>

For Scotland, what is important to note is that the secret discussions did not involve the Lord President, the Lord Advocate, the Advocate General, the Law Lords, the Scottish judges, the Faculty of Advocates or the Law Society of Scotland. In one sense, that is not surprising because the changes – apart of course from the decision to create a Supreme Court<sup>12</sup> – hardly affected Scotland. The relevant effects *in England* of abolishing the office of Lord Chancellor were that the previous method of appointing judges had to be scrapped, that the English judiciary lost the main bulwark of their independence from the executive, and that the disciplinary system for English judges effectively ceased to exist.

However, in Scotland, the Lord Chancellor had no functions in relation to the appointment of judges to the Court of Session. The independence of the Scottish judiciary equally owed nothing to the role of the Lord Chancellor: it depended upon

6 The ouster clause survived only until 4 May 2004 when, in deference to the views of Lord Irvine, the government abandoned it at the Committee stage of the Bill in the House of Lords. Thus the issue that generated the constitutional big bang expired unremarked and unmourned.

7 The leading protagonist of which was Lord Irvine, when Lord Chancellor.

8 In this article the term “England” is usually intended to embrace England and Wales.

9 And QCs, in England and Wales.

10 Not necessarily a lawyer or a member of the House of Lords.

11 HL Deb 16 June 2003, col 541.

12 This is a separate issue not dealt with in this note.



a separate, distinct and pre-1707 convention that no one had dreamt of challenging for centuries: indeed, that independence had recently been buttressed by the Human Rights Act 1998 and the Scotland Act 1998.<sup>13</sup> If it had been thought necessary to modify that convention by legislation, then the time to do it was when the Scotland Act 1998 was passed. That Act contained new provisions about the appointment and removal of judges; and it also dramatically altered the constitutional role of the Lord Advocate who, until then, had been seen as having a role as protector of judicial independence. The Lord Chancellor had no role in relation to disciplining the Scottish judiciary: that was a matter for the Lord President, and section 95 of the Scotland Act.

The changes rendered necessary in England by the abolition of the office of Lord Chancellor were given effect to in the Constitutional Reform Act 2005.<sup>14</sup> The provisions of the 2005 Act in relation to the new mechanisms for appointing, removing or disciplining judges did not apply to Scotland.<sup>15</sup> The novel statutory “guarantee” of judicial independence contained in the 2005 Act specifically did “not impose any duty which it would be within the legislative competence of the Scottish Parliament to impose”.<sup>16</sup> Thus the position of the judiciary in Scotland was virtually unaffected by the constitutional upheaval in England.

It is therefore something of a surprise that the Scottish Executive’s consultation paper of February 2006<sup>17</sup> presented its proposals as if ministers and civil servants had been thinking freshly and deeply about constitutional issues affecting the Scottish judiciary, when in truth the relevant proposals were slavishly copied from the Constitutional Reform Act.<sup>18</sup>

However, surprise is not the issue. The issue is whether or not it makes any sense now to introduce into Scotland a series of changes that were deemed, in England, to be necessitated by developments peculiar to that jurisdiction, given that they had little or no bearing on the Scottish judicial system, its history, tradition, conventions and needs. To address that issue, it is necessary to examine some of these changes as contained in the Bill.

## B. JUDICIAL INDEPENDENCE

Section 1 of the Bill, cribbing the 2005 Act, announces a “[g]uarantee of continued judicial independence”, and lists some persons who “must uphold the continued independence of the judiciary”.<sup>19</sup> The word “continued” acknowledges

13 See also *Parliamentary Supremacy; Judicial Independence: Latimer House Guidelines for the Commonwealth* (1998), available at [www.cpaq.org/uploadedFiles/Information\\_Services/Publications/CPA\\_Electronic\\_Publications/Latimer%20House%20Guidelines.pdf](http://www.cpaq.org/uploadedFiles/Information_Services/Publications/CPA_Electronic_Publications/Latimer%20House%20Guidelines.pdf).

14 Which received Royal Assent on 24 March 2005. It is not necessary to notice here any separate Northern Ireland legislation that was enacted. The title “Lord Chancellor” has survived, on the same basis as “Captain of the Yeomen of the Guard”.

15 Apart from a few minor provisions that have no bearing on the issues discussed here.

16 Section 3(2).

17 Scottish Executive, *Strengthening Judicial Independence in a Modern Scotland* (n 2).

18 It may, for some, be a surprise, that a Scottish government led by the SNP adopted these “English” solutions plagiarised by their predecessors.

19 The limited content of the duty is made clear by s 1(2).

that judicial independence is not a creature of this legislation. So the creation of the new duty begs the question, “Have those upon whom the duty is imposed had any such duty hitherto?” One would have thought that the Lord Advocate, the First Minister and the others specified would adamantly assert that, of course, they had such a duty. Would they “seek to influence particular judicial decisions through any special access to the judiciary”<sup>20</sup> if the new legislation were not enacted? “Certainly not!”, they would chorus. Anyway, regardless of the terms of this section, would it not be a crime to seek to exercise such influence? It surely would. And if the statutory duty is imposed only upon those specified, does that mean that others not specified are free to influence “particular decisions”? Could the Lord Advocate’s spouse or the First Minister’s uncle seek, with impunity, to influence a judge’s “particular” decision? What about a developer, like Donald Trump?

Surely the duty sought to be imposed by this section already exists at common law? If so, why enact it? Is there not a danger that some might argue that they are free to exercise influence because they are not covered by the section and that the section replaces the pre-existing common law? It is important to note that there is no sanction whatsoever for breach of this duty. The common law makes it a crime to attempt to interfere with the course of justice: this Bill creates no corresponding crime or offence.

Section 1(2)(b) imposes on the First Minister, Lord Advocate and Scottish Ministers a special duty to “*have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions*”. This, however, does no more than require the named ministers to take notice of that need; they are not obliged to provide the support, so in no sense does it improve the legal power of the Lord President to obtain adequate resources.

### C. HEAD OF THE SCOTTISH JUDICIARY

Section 2 provides that the Lord President “is the Head of the Scottish Judiciary”. At first blush, this looks a bit like enacting, “The Pope is a Catholic”, or “Hens lay eggs”. Of course the Lord President is the head of the Scottish judiciary: everybody knows that: so why enact it? Does it change anything? It does.

Whether or not this enactment, by defining what he is “responsible” for, detracts from the Lord President’s traditional powers and functions remains to be seen. But what it clearly does do is to confer on the Lord President a new statutory post entitled “Head of the Scottish Judiciary”.<sup>21</sup> It thereby adds very significantly to the burdens already resting upon him.<sup>22</sup> As I said in my responses to the 2006 paper:<sup>23</sup>

There is a very fundamental point here that the authors of this Bill do not seem to have grasped. It is this. The Lord President is primarily a judge. Unless the holder of that office

<sup>20</sup> Words quoted from s 1(2)(a).

<sup>21</sup> NB the capital letters used in “Head” and “Judiciary”.

<sup>22</sup> For the full list of statutory functions, see s 2(2) and others created by this Bill.

<sup>23</sup> Available at [www.scotland.gov.uk/Publications/2006/06/13143517/0](http://www.scotland.gov.uk/Publications/2006/06/13143517/0).

has been a Law Officer of the Crown, it is quite likely that he has little hands-on experience of administering institutions or persons: his whole career will have been spent in the study, understanding and applying of the law. What this whole paper tends to do is to transform the Lord President into a super administrator. That can only mean that he will have to recruit civil servants to do all the nitty gritty and to provide him with advice and possible courses of action. It will necessarily diminish his capacity to give a *judicial* lead in matters of law, as has been the tradition. It looks like another example of “empire-building” by civil servants.

The only saving grace is the Bill’s acceptance of the Lord President’s right to delegate certain functions to “a judicial office holder”.<sup>24</sup>

#### D. JUDICIAL APPOINTMENTS

The provisions on judicial appointments<sup>25</sup> unnecessarily turn an administrative body into a statutory one. However, there is, I believe, a contradiction between section 12(2) (“Selection must be solely on merit”) and section 14(1) (“In carrying out its functions, the Board must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to judicial office”).<sup>26</sup>

Either the selection is “solely” on merit or it is not. The only acceptable criterion for appointment is merit. Judges are not in the business of *making* the law, except in very rare instances where it is necessary to make good a *lacuna*. Those who *make* law – legislators – should obviously reflect social diversity. But judges are not chosen to decide what the law should be. Their job is to discover what the law *is* and to apply it objectively to the case in hand: their personal perspectives on such matters as religion, sexuality or politics should have no bearing whatsoever on how they do their job. The *Explanatory Memorandum* suggests that new candidates should be selected as “representative of the communities in which they will serve”. It is a novel idea that judges should be chosen to “represent” communities. If we want more judges from social categories that provide few judges at the present time that object must be achieved through measures to ensure that such people acquire the necessary “merit” in the first place. Positive discrimination is a powerful and sometimes necessary tool for social engineering. It may well be a sound basis for selecting entrants to higher education (as in the USA) or to Parliament; but it cannot be a sound basis for selecting High Court judges.

If section 14(1) is simply intended to encourage people from outside the traditional pool of candidates to become *qualified* to apply for selection, it is difficult to see how the Judicial Appointments Board can sensibly give it effect. It would be hypocritical for the Board to encourage applications from people who cannot jump the “merit” hurdle: there is no virtue in encouraging people to apply if their applications are bound to fail for lack of “merit”. So, if the government wants people from outwith

<sup>24</sup> Section 3, as suggested by me in my responses to the 2006 Paper. Part 2, chapter 2 of the Bill (ss 4-8) re-enacts the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 and is not discussed here.

<sup>25</sup> Chapter 3 of Part 2 (ss 9-25).

<sup>26</sup> Both provisions are lifted from the Constitutional Reform Act 2005.

the traditional catchments to have a realistic chance of being appointed, then it is up to the government to supply the means and the resources to enable such people to acquire the skills and experience that constitute “merit” within the (undefined) meaning of section 12(2). But the Board is given no resources for this purpose. There is no machinery whereby people who do not practise law at the highest level can acquire the skills that create and constitute “merit”. The Board has no resources or skills itself to create machinery for enabling those without “merit” to acquire it. Accordingly, if 14(1) is *not* contradictory of 12(2), it is nothing more than gesture politics, designed to pretend that people from “diverse” communities will have some prospect of elevation to the bench, even if they lack “merit”.

### E. FINAL THOUGHTS

It is impossible in a short note to do justice to the weaknesses in the provisions, not yet mentioned, for regulating judicial conduct and removing judges.<sup>27</sup> The existing systems have not been shown to be inadequate. The system for sheriffs has worked for over a century. That for senior judges has never been used at all. The case for creating new, expensive bureaucratic structures for regulating these matters<sup>28</sup> is not made out. Alas, it all smacks of empire-building quangoism.

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## Law Reform after *World's End*

Christine Eadie and Helen Scott went to the *World's End* pub on 15 October 1977. The following day their bodies were discovered. They had been bound and strangled. Nearly thirty years later Angus Robertson Sinclair, a convicted murderer and sex offender,<sup>1</sup> was tried for their abduction, rape and murder. He was accused of having acted along with his late brother-in-law, Gordon Hamilton, whose DNA was also found on the girls' clothes. Sinclair lodged a special defence incriminating Hamilton, and claimed that Hamilton had acted alone. After the Crown

<sup>27</sup> Chapters 4 and 5 of Part 2 of the Bill (ss 26-38).

<sup>28</sup> Including creating a new regulator – the “Judicial Complaints Reviewer” – to review investigations carried out by those inquiring into judicial conduct: he cannot be a qualified lawyer. See ss 28-31 of the Bill.

<sup>1</sup> It was revealed after the trial that he had been convicted of strangling and sexually assaulting an 8-year-old in 1961, and that he is currently serving a life sentence for the murder of a teenager in 1978. See [http://news.bbc.co.uk/1/hi/scotland/edinburgh\\_and\\_east/6983515.stm](http://news.bbc.co.uk/1/hi/scotland/edinburgh_and_east/6983515.stm).

case concluded Sinclair's counsel made a submission of no case to answer.<sup>2</sup> This submission was upheld by the trial judge and Sinclair was acquitted.<sup>3</sup> No appeal was available to the Crown.

The decision provoked a political furore.<sup>4</sup> The Lord Advocate, Elish Angiolini QC, made a statement to the Scottish Parliament on 13 September 2007. During the questions that followed she was asked about reform of the law on appeals and the treatment of previous convictions.<sup>5</sup> The Lord Advocate indicated that reform of these areas should be considered by the government, the legislature, or some other body.<sup>6</sup>

#### A. THE REFERENCE

Under section 3(1)(e) of the Law Commissions Act 1965 government ministers can refer matters to the Scottish Law Commission. On the 21 November 2007 the Justice Secretary, Kenny MacAskill, announced that, in light of public concern regarding the *World's End* case, various aspects of criminal evidence and procedure had been referred to the Commission for review.<sup>7</sup> The Commission was asked to consider the law relating to:

judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;<sup>8</sup> the principle of double jeopardy,<sup>9</sup> and whether there should be exceptions to it; admissibility of evidence of bad character or of previous convictions, and of similar fact evidence;<sup>10</sup> the *Moorov* doctrine;<sup>11</sup> and to make any appropriate recommendations for reform.

The Commission must report by the summer of 2008 on rights of appeal and as early as practicable in 2009 on double jeopardy, with the other projects to follow in the due course. The timescale for the project on rights of appeal is very short, particularly given the way in which the Commission operates.

<sup>2</sup> Criminal Procedure (Scotland) Act 1995 s 97.

<sup>3</sup> For discussion, see S Di Rollo, "*HM Advocate v Sinclair*: legitimate inference v illegitimate speculation" 2008 SCL 151.

<sup>4</sup> See H L MacQueen and S Wortley, "*World's End* murder trial" (2008) 12 EdinLR 3.

<sup>5</sup> For the statement and questions see Scottish Parliament, *Official Report* cols 1763-1785 (13 Sept 2007).

<sup>6</sup> At col 1785.

<sup>7</sup> See [www.scotland.gov.uk/News/Releases/2007/11/21103557](http://www.scotland.gov.uk/News/Releases/2007/11/21103557).

<sup>8</sup> Interpreted widely by the Commission to include: upholding of a submission of "no case to answer" in a case involving a jury (Criminal Procedure (Scotland) Act 1995 s 97); a common law submission that a jury should not convict; and a ruling on admissibility of prosecution evidence that so weakens the prosecution case that the case is abandoned. See Scottish Law Commission, *Newsletter Issue 6* (2008).

<sup>9</sup> See F P Davidson, *Evidence* (2007) paras 2.22-2.25 on *res judicata* in criminal cases.

<sup>10</sup> See Davidson, *Evidence* paras 10.28-10.77, esp at paras 10.32 ff on previous convictions.

<sup>11</sup> The rule where evidence of a single witness in relation to one charge can corroborate evidence of a single witness in relation to another charge provided that the charges relate to acts so connected in time, character and circumstances that an inference that they are instances of a course of similar conduct is justified: *Moorov v HMA* 1930 JC 68. See Davidson, *Evidence* paras 15.72-15.88.

## B. LAW REFORM PROJECTS – THE STANDARD APPROACH

The Commission's standard approach to reform projects involves a number of stages.<sup>12</sup> It begins with preliminary investigation of the area, involving research and policy formulation. Policy formulation is a reflective process informed by the initial research (evaluating Scots law and comparative approaches),<sup>13</sup> and by any preliminary consultation or empirical research.<sup>14</sup> Following this initial work a discussion paper is published containing the provisional views of the Commission and inviting comment during a consultation period of at least twelve weeks and often longer.<sup>15</sup> For example, consideration of ten recent discussion papers reveals consultation periods of three,<sup>16</sup> three-and-a-half,<sup>17</sup> four,<sup>18</sup> and four-and-a-half months.<sup>19</sup> Such lengthy consultation periods assist reflection on the proposals and fit in with the practice of institutional or representative bodies where the establishment and meeting of sub-committees or working parties, and subsequent endorsement of these bodies' approach, can be lengthy.<sup>20</sup>

12 For a flowchart, see [www.scotlawcom.gov.uk/html/flow\\_chart.html](http://www.scotlawcom.gov.uk/html/flow_chart.html).

13 See e.g. the Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007) Appendix A, where the intestacy rules of over thirty jurisdictions are examined.

14 For example, examination of a foreign system may point out a deficiency or omission in the domestic system thereby influencing the development of policy (e.g. Discussion Paper on *Real Burdens* (Scot Law Com DP No 106, 1998) paras 2.58-2.59) or a policy can be proposed but feedback from an advisory group or at a seminar can lead to rejection (e.g. Discussion Paper on *The Nature and the Constitution of Trusts* (Scot Law Com DP no 133, 2006) paras 2.39-2.45) or work may involve obtaining empirical data (e.g. Discussion Paper on *Succession* (n 13)).

15 The proposals can take the form of open questions (e.g. Discussion Paper on *Attachment Orders and Money Attachments* (Scot Law Com DP No 108, 1998) para 2.100, mirroring a balanced discussion at paras 2.51-2.54 on the general issue of co-owned property) or questions designed to seek opinion on a preliminary policy view (e.g. Discussion Paper on *Damages for Wrongful Death* (Scot Law Com DP No 135, 2007) para 3.9). The opinion of a single consultee can see a view rejected: e.g. the policy in the Discussion Paper on *Real Burdens* (n 14) paras 3.44-3.49 was rejected, despite widespread approval, following a response from Professor A J McDonald: see Report on *Real Burdens* (Scot Law Com No 181, 2000) paras 11.48-11.56.

16 Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005); Discussion Paper on *Variation and Termination of Trusts* (Scot Law Com DP No 129, 2005); Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005); Discussion Paper on *Rape and Other Sexual Offences* (Scot Law Com DP No 131, 2006); Discussion Paper on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com DP No 132, 2006); Discussion Paper on *The Nature and the Constitution of Trusts* (n 14).

17 Discussion Paper on *Interest on Debt and Damages* (Scot Law Com DP No 126, 2005).

18 Joint Consultation Paper on *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Scot Law Com DP 134, 2007); Discussion Paper on *Damages for Wrongful Death* (n 15).

19 Discussion Paper on *Succession* (n 13).

20 For example, the writer is a member of the Law Society of Scotland conveyancing committee. This meets bi-monthly. When the committee regularly responded to Commission work on land law the process was as follows: a working party was established at one meeting, and met between committee meetings reporting to the main committee's next meeting. If the main committee disagreed, the matter might be remitted back to the working party to consider, meaning four months might expire from setting up the committee to the submission of a response.

Once consultation responses have been received they are analysed within the Commission, and work begins on a final report developing and refining policy proposals through recommending specific policies and legislative responses, typically through instruction and preparation of a draft bill. Drafting a bill helps refine policy, as unforeseen lacunae in policy are revealed during the scrutiny of various drafts of the proposed bill. The drafting and review of legislation can be time-consuming and is dependent on the Commission having an appropriate level of drafting resources.<sup>21</sup>

### C. THE *WORLD'S END* REFERENCE AND THE COMMISSION

A normal law reform project will run for two or three years. This is generally the case even where the Commission work follows a government reference. A timescale of under a year, such as that for the reference on rights of appeal, is very difficult to satisfy, for two reasons. First, the Commission has a great deal of other work to do, including other government references, ongoing work under the most recent programme for law reform, and joint projects with the Law Commission for England and Wales. Second, the Commission operates with a relatively small team, at present comprising a part-time chairman, three full-time Commissioners, one part-time Commissioner, five full-time solicitors, a part-time solicitor, a trainee solicitor, and five research assistants.

The timetabling concerns that may arise from the *World's End* reference can be shown by considering the time taken from reference to report in the three most recent criminal law references: rape and sexual offences (two and a half years),<sup>22</sup> insanity and diminished responsibility (two years and nine months);<sup>23</sup> and the age of criminal responsibility (fourteen months).<sup>24</sup>

Against this background the requirement to report by the summer of 2008 on rights of appeal gives the Commission only eight months to research,<sup>25</sup> publish a discussion paper, analyse responses, work up a draft bill and prepare a report. Such a timescale is not unheard of for a reference, but is highly unusual. Professor Gerry Maher QC, one of the lead Commissioners on the *World's End* reference, joined

21 The Commission now employs a part-time Parliamentary Counsel – see *Annual Report 2006* (Scot Law Com No 205, 2007) 5 and 22. Immediately after the introduction of devolution the Commission struggled to access adequate drafting resources. See e.g. the forewords by Lord Gill to the *Thirty-Fourth Annual Report 1998-99* (Scot Law Com No 179, 2000) ix, the *Thirty-Fifth Annual Report 2000* (Scot Law Com No 182, 2000) ix, and the *Thirty-Sixth Annual Report 2001* (Scot Law Com No 186, 2002) ix; and the foreword by Lord Eassie to the *Thirty-Seventh Annual Report 2002* (Scot Law Com No 189, 2003) xi.

22 Report on *Rape and Sexual Offences* (Scot Law Com no 209, 2007) published on 19 December 2007 following a discussion paper published in January 2006 and a reference received in June 2004.

23 Report on *Insanity and Diminished Responsibility* (Scot Law Com no 195, 2004) published on 1 July 2004 following a discussion paper published on 24 January 2003 and a reference received in October 2001.

24 Report on the *Age of Criminal Responsibility* (Scot Law Com no 185, 2002) published on 14 January 2002 following a discussion paper published in July 2001 and a reference received on 31 October 2000.

25 In researching the project the Law Commission is being assisted by a group comprising members of the judiciary: see *Annual Report 2007* (Scot Law Com No 211 (2008)) 16.

the Commission in February 2000. His first substantive project saw publication of the Report on *Poining and Warrant Sale* in April 2000 following a reference in September 1999.<sup>26</sup> To satisfy that timetable the Commission had a compressed consultation period of two months. And while the final report was eventually implemented in the Debt Arrangement and Attachment (Scotland) Act 2002 no bill was appended to the report, with the resultant difficulties this causes for the development of policy.

It is likely that the self-contained nature of the first strand of the *World's End* project means that the timetable can be satisfied, although the project has been interpreted more broadly than may originally have been expected.<sup>27</sup> And – as with poindings – the project enters territory which is potentially politically sensitive. As the Commission discovered during the poinding project this carries its own risks. When asked to review that area the Commission was in a position to consider legal policy but did not have guidance on the desired political objective. The two need not coincide. Despite the clear legal policy in favour of maintaining a means of enforcing judgments against corporeal moveable property (to maintain a principle of universal attachability),<sup>28</sup> a bill for the abolition of poindings, introduced by Tommy Sheridan MSP, was duly enacted by the Scottish Parliament.<sup>29</sup>

At the time of writing the Commission has indicated that it will publish a discussion paper in spring 2008.<sup>30</sup> This is being prepared without a publicly stated government position, although the position of the Conservative and Labour parties is clear.<sup>31</sup> Whether there is a risk of a clash between legal policy and the political imperative is not yet clear, but in framing the discussion paper and resultant report the Commission needs to be mindful of the risks that tainted the immediate aftermath of the poinding report.<sup>32</sup> If there is a political desire to introduce such rights of appeal it would be better for the government to express this, as this would obviously have implications for the manner in which the discussion paper and final report are produced, with implications for adherence to the tight timetable.<sup>33</sup>

The second strand of the *World's End* project (double jeopardy) is a more substantial undertaking – and with initial resources on criminal law directed at the

26 Scot Law Com No 177, 2000.

27 See n 8 above.

28 Subsequently acknowledged in the passage of the Debt Arrangement and Attachment (Scotland) Act 2002.

29 Albeit reversed by the Debt Arrangement and Attachment (Scotland) Act 2002 (with votes from those who had supported the Abolition of Poinding and Warrant Sales (Scotland) Act 2000).

30 Scottish Law Commission, *Annual Report 2007* (Scot Law Com No 211 (2008)) 16, 26.

31 See Margaret Curran and Bill Aitken during the questions on the *World's End* prosecution (n 5).

32 For the tone of some criticism of the Commission, see the Stage 3 debate in the Scottish Parliament, *Official Report* col 634 (John MacAllion MSP) and col 639 (Lloyd Quinan MSP) (6 Dec 2000).

33 This does not preclude the involvement of the Commission. For example, the Commission previously looked at the abolition of the feudal system. That the system would be abolished was a given – the Commission had to consider the mechanics of abolition. For the right of appeal project, a political decision to introduce such a right could see the Commission appropriately concentrating resources on examination of the mechanics of the procedure (e.g. the timescale or the method of hearing the appeal) rather than considering the merits and demerits of a right of appeal being introduced at all.



first strand of the reference the timetabling of this project may be more problematic. Double jeopardy was subject to review by the Law Commission in England following a reference from the Home Secretary on 2 July 1999. The Law Commission reported in January 2001,<sup>34</sup> with publication two months later.

Twenty months from reference to publication is as long as (or longer than) the timetable that appears to have been given to the Commission to report on double jeopardy in Scots law. At the time when this project was being completed by the Law Commission there were five full-time members of the Government Legal Service, three research assistants, and the Chairman of the Commission working on criminal law projects.<sup>35</sup> By contrast, the Scottish Law Commission has two Commissioners (the part-time chairman, Lord Drummond Young, and Professor Maher),<sup>36</sup> one full-time member of the legal service and two research assistants working on the *World's End* reference. This team of half the size is working to a similar timetable. While this may demonstrate a touching faith in the efficiency and cost-effectiveness of work within the Scottish Law Commission, it is important that those holding the purse strings realise that, if it is to work on time-pressured references as well as on other areas of social and legal importance, the Commission can only maintain the high quality of its recent work if it is properly resourced.

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## The True Meaning of “Wicked Recklessness”: *HM Advocate v Purcell*

For at least forty years, English criminal lawyers have been remarkably concerned with a persistent, but thankfully hypothetical, insurance fraudster. This villain, the story runs, has some valuable cargo on board an aeroplane, on which he places a time-bomb, with the aim of collecting the insurance on his cargo. Should this bomb go off, the passengers and crew of the plane will inevitably die.<sup>1</sup>

The difficulty here is that under English law, a person can only be guilty of murder if he intended either to kill or do grievous bodily harm.<sup>2</sup> The insurance fraudster, it is

34 *Double Jeopardy and Prosecution Appeals* (Law Com No 267, 2001) leading to the Criminal Justice Act 2003, Part 10.

35 *Thirty-Sixth Annual Report 2001: A Year of Achievement* (Law Com No 275, 2002) Part V.

36 Professor Maher is scheduled to leave the Commission in August 2008 and at the time of writing there has been no advertisement for his replacement.

1 See, e.g., *Imputed Criminal Intent* (Law Com No 10, 1967) para 18; A Ashworth, *Principles of Criminal Law*, 5<sup>th</sup> edn (2006) 177.

2 See, e.g., *R v Woollin* [1999] 1 AC 82.

thought, certainly *ought* to be guilty of murder, but can he be said to intend to kill? Is he not simply indifferent to the fate of those on board the plane?

Haunted by hypotheticals such as this,<sup>3</sup> the history of “intention” in English criminal law has been a tortured one.<sup>4</sup> The current position seems to be that if death or serious bodily harm was a virtual certainty as a result of the defendant’s action, and the defendant realised this was the case, the jury are “entitled to find” intention established.<sup>5</sup> This is, however, hardly satisfactory. In particular, if the jury is merely *entitled* (and not bound) to find intention established in such cases, how is it to decide whether or not to do so?<sup>6</sup>

Scots lawyers have watched these debates with detached amusement. Because the *mens rea* of murder is different in this jurisdiction – constituted either by a wicked intention to kill or wicked recklessness<sup>7</sup> – the debate has been treated as irrelevant.<sup>8</sup> the insurance fraudster, it has been said, can be convicted on the basis that his actions demonstrate wicked recklessness.<sup>9</sup> English lawyers have sometimes used the insurance fraudster hypothetical in order to argue that the *mens rea* of murder in English law should be altered along the lines found in Scotland.<sup>10</sup>

Thanks to a recent decision of the High Court, however – a decision reached in rather unusual circumstances – it seems that all this was wrong, and that the true meaning of “intention” is, in principle, just as important to the Scots law of murder as the English. The case is *HM Advocate v Purcell*.<sup>11</sup>

#### A. PURCELL: FACTS AND PROCEDURE

The charge against Mr Purcell was that he had committed murder by driving a car so recklessly that he hit and killed a young boy. Such a charge is exceptional, because it is normally expected that a death resulting from the use of a motor vehicle – except,

3 For an alternative, see G Williams, *The Mental Element in Crime* (1965) 13.

4 For an overview, see Ashworth, *Principles* (n 1) 174-181.

5 *R v Woollin* [1999] 1 AC 82, adopting the test formulated in *R v Nedrick* [1986] 1 WLR 1025 but replacing “infer” with “find” “in the interests of clarity” (per Lord Hope of Craighead at 97).

6 See M C Kaveny, “Inferring intention from foresight” (2004) 120 LQR 81.

7 *Drury v HM Advocate* 2001 SLT 1013.

8 Of course, the correct meaning of “intention” could arise in the context of other criminal offences, but the English experience suggests it is overwhelmingly more likely to arise in respect of murder than elsewhere.

9 G H Gordon, *The Criminal Law of Scotland*, 3<sup>rd</sup> edn, by M G A Christie, vol 1 (2000) para 7.18. (This view is not reconcilable with the position taken in vol 2 of Gordon’s *Criminal Law* and endorsed by the court in *Purcell*: for which see B. below.) To similar effect, although not concerned with this particular hypothetical, see R A A McCall Smith and D Sheldon, *Scots Criminal Law*, 2<sup>nd</sup> edn (1997) 178-180. McCall Smith and Sheldon’s position, however, depends on rather doubtful interpretations of the Scottish authorities which the authors cite: the better analysis, reaching a contrary conclusion, is that of T H Jones and M G A Christie, *Criminal Law*, 3<sup>rd</sup> edn (2003) 9-46-9-47.

10 See, in particular, Lord Goff, “The mental element in the crime of murder” (1988) 104 LQR 30 at 56.

11 [2007] HCJ 13, 2008 SLT 44.

perhaps, where a vehicle has been used deliberately as a weapon<sup>12</sup> – will at most be charged as the statutory offence of causing death by dangerous driving.<sup>13</sup>

This statutory offence derives from the offence of causing death by reckless or dangerous driving, introduced both north and south of the Border in 1956 because it was believed that “juries had been unwilling to convict of manslaughter in cases of death caused by car drivers”.<sup>14</sup> As recently as 1983, it was judicially suggested that a prosecution for manslaughter as a result of reckless driving would only be brought “in a very grave case”,<sup>15</sup> and in 2001 Michael Christie wrote that prosecutions for culpable homicide by grossly negligent driving were in a “process of disappearing” now that the penalty for causing death by dangerous driving was a maximum of ten years’ imprisonment.<sup>16</sup>

Against that background, the murder charge against Mr Purcell was wholly exceptional, but then his conduct was extreme: in eventually sentencing him to twelve years’ imprisonment for culpable homicide, Lord Uist said that the “course of wild and reckless driving in which you engaged before, during and after this fatal accident was wholly atrocious in nature and placed the lives of everyone in your wake in serious danger”.<sup>17</sup>

For whatever reason, Mr Purcell’s counsel did not take a plea to the relevancy of the charge against him,<sup>18</sup> or even a statutory submission of no case to answer, but instead chose to submit after both the Crown and defence evidence had been led that there was no basis on which the jury could return a verdict of guilt of murder.<sup>19</sup> This procedure was technically competent but wholly undesirable. Nothing turned on the evidence which had been led in court: counsel’s submission was simply that some form of “wilful act” (probably an assault) was required as a basis for a conviction of murder, and no such act had been alleged in the indictment.

It is, for obvious reasons, undesirable to have to deal with complex submissions of law after a jury has been empanelled.<sup>20</sup> Had counsel’s submission been raised as a preliminary plea,<sup>21</sup> there would have been no question of impeding the proper course of a jury trial: instead, the matter could have been decided by a single judge and an

12 As in *Brian Venuti*, High Court at Glasgow, September 2004 (convictions for murder and attempted murder by driving into a group of persons). See also *Kelly v HM Advocate* 2006 SCCR 9 (attempted murder).

13 Road Traffic Act 1988 s 1, as amended.

14 *Government of the United States of America v Jennings* [1983] 1 AC 624, at 629 per Lord Roskill, discussing s 8 of the Road Traffic Act 1956.

15 *Government of the United States of America v Jennings* at 644 per Lord Roskill.

16 G H Gordon, *The Criminal Law of Scotland*, 3<sup>rd</sup> edn, by M G A Christie, vol 2 (2001) para 26.09 n 44. The maximum penalty for the offence created in 1956 was five years’ imprisonment: Road Traffic Act 1956 s 8(1).

17 See [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05\\_10\\_07\\_purcell.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_10_07_purcell.pdf).

18 As to whether the court could have raised the issue of relevancy *ex proprio motu*, see *Cartwright v HM Advocate* 2001 SLT 1163; *Heywood v McLennan* 1994 SCCR 1.

19 See *Purcell* at para 2.

20 Cf *HM Advocate v Mowat* 2001 SLT 738.

21 As it plainly could have been: see *Purcell* at para 19. In theory, it might have been open to the court to refuse to entertain counsel’s submission on the basis that it was in substance a preliminary plea in terms

appeal taken if necessary. As it was, the trial judge was put in the unenviable position of being asked to determine the correct answer to a hugely important but uncertain legal question.

Perhaps mindful of the media and parliamentary storm which had surrounded the recent decision of another judge, sitting alone, to uphold a no case to answer submission in another high profile murder trial,<sup>22</sup> Lord Uist decided that the issue should be dealt with by a bench of three judges, which was promptly convened.

This approach – almost certainly the least worst option available – may seem to replicate an appeal court hearing, but it has significant disadvantages. In particular, appellate courts are more likely to produce “correct” decisions not just because of the increased number of judges sitting on them, but because of the opportunities for refinement of argument: they have a previous reasoned decision to consider and counsel can reconsider and refine their arguments on the basis of that decision.<sup>23</sup> As it was, the opinion of the court, while careful and thoughtful, is open to criticisms which might have been avoided had a different procedure been followed at the outset.

### B. *PURCELL*: THE DECISION

In summary, the decision in *Purcell* is clear and simple: murder requires that death be caused either “with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences”.<sup>24</sup> Scots law can no longer rely on wicked recklessness to sidestep the problem of “intention”. There are two obvious problems with this approach, however.<sup>25</sup>

First, a problem of doctrine: the decision is not as easily reconciled with precedent as the *Purcell* court seems to think. Although the review of the authorities conducted by Lord Eassie is careful and thorough, there is one surprising omission: the decision of a court of seven judges in *Brennan v HM Advocate*.<sup>26</sup> There, the court rejected an argument that a person who had suffered a “total alienation of reason” as a result of voluntary intoxication could be acquitted of murder. The court’s reasoning appears to have been as follows: even if Brennan had been so drunk as to be incapable of forming any intention, becoming grossly intoxicated was *itself* wickedly reckless.<sup>27</sup> It is not easy to see how this approach can be reconciled with the decision in *Purcell*.<sup>28</sup>

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of s 72 of the Criminal Procedure (Scotland) Act 1995 and no cause had been shown for dealing with the point at such a late stage. The potential objections to such a course in this context will be obvious.

<sup>22</sup> See H L MacQueen and S Wortley, “World’s End murder trial” (2008) 12 EdinLR 3.

<sup>23</sup> As is implicitly recognised in *McPhelim v HM Advocate* 1996 JC 203 and *HM Advocate v Al-Megrahi* (No 5) 2002 JC 38. See further J Chalmers, “Scottish appeals and the proposed Supreme Court” (2004) 8 EdinLR 4 at 7-8.

<sup>24</sup> *Purcell* at para 16, quoting with approval from Gordon, *Criminal Law* (n 9) para 23.33.

<sup>25</sup> Space precludes a fuller aspect of the substantive aspects of *Purcell* here: they are discussed in more detail in M Plaxton, “Foreseeing the consequences of *Purcell*” 2008 SLT (News) 21.

<sup>26</sup> 1977 JC 38.

<sup>27</sup> *Brennan* at 50-51 per the Lord Justice-General (Emslie).

<sup>28</sup> It may not need to be reconciled given the approach of “presuming” *mens rea* in cases of voluntary intoxication advocated in *Ross v HM Advocate* 1991 JC 210 but that approach has serious

Second, a problem of principle: is this outcome desirable? Scots lawyers have tended to argue that it should be possible for purely reckless killings to be treated as murder,<sup>29</sup> although this might make it difficult to “sustain a morally defensible boundary” between murder and culpable homicide.<sup>30</sup> But even if that is accepted, the approach taken by the *Purcell* court may be overly narrow: should murder not also encompass a person who intends to create a risk or fear of injury and demonstrates wicked recklessness in so doing?<sup>31</sup> Is it really desirable that a person who fires a gun at another to scare them, intending to miss but perhaps not caring too much about whether he does, should be guilty merely of culpable homicide and not murder?<sup>32</sup>

However, part one of a familiar refrain applies: these are not questions for the courts, but instead matters for Parliamentary law reform. Regrettably, part two of the refrain – refer it to the Scottish Law Commission! – is inapposite on this occasion: the Commission has more than enough criminal law to occupy itself with right now.<sup>33</sup>

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## Reforming Rape and Other Sexual Offences

Rape was redefined by the High Court in *Lord Advocate's Reference (No 1 of 2001)*<sup>1</sup> as sexual intercourse (that is, penile penetration of the vagina) without the consent of the complainer. Subsequent cases highlighted deficiencies in the law, particularly the difficulties faced by the Crown in establishing that the accused was aware that the complainer had not consented to intercourse,<sup>2</sup> and led to growing recognition that the law did not reflect current attitudes towards certain sexual behaviours. This prompted the Scottish Executive to invite the Scottish Law Commission to review the law relating to rape and other sexual offences.<sup>3</sup>

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problems itself: see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) paras 8.10-8.13.

29 See e.g. McCall Smith and Sheldon, *Scots Criminal Law* (n 9) 178-180.

30 The quote is from the Law Commission's consideration of this question in respect of English law: *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 2.13.

31 Under the Law Commission's proposals, this would be second degree murder: *Murder, Manslaughter and Infanticide* para 1.36.

32 See the unreported case of *Patrick McCarron* (1964), noted in Gordon, *Criminal Law* (n 16) para 23.17.

33 See S Wortley, “Law reform after *World's End*” (2008) 12 EdinLR 293.

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1 2002 SLT 466.

2 For example, *Cinci v HM Advocate* 2004 JC 103 and *McKearney v HM Advocate* 2004 JC 87.

3 Under s 3(1)(e) of the Law Commissions Act 1965. The reference to the Commission was made in June 2004.

The resulting Report of the Scottish Law Commission on *Rape and Other Sexual Offences*<sup>4</sup> refers to the recent Crown Office and Procurator Fiscal Service review of the prosecution of sexual offences and rightly notes that such matters are not within the Commission's remit.<sup>5</sup> But at some point someone needs to take a more holistic approach to the issue. It is disappointing that the Commission decided not to make any recommendations in respect of the law of evidence. Scotland's conviction rate for rape is currently 3.9% of reported cases. Until key aspects of the law of evidence are clarified, reforming the substantive law will not necessarily increase this appallingly low figure.<sup>6</sup>

### A. OFFENCE CATEGORIES AND GUIDING PRINCIPLES

A brief analysis cannot do justice to each of the Commission's 62 recommendations; hence this commentary describes some of the main proposals, and highlights some areas which may need further consideration. The Report distinguishes three categories of sexual offence:

1. Those designed to promote or protect sexual autonomy.
2. Those which aim to protect people who may be vulnerable to sexual exploitation.
3. So-called "morals offences" – activities which the law currently proscribes, but which are not within either of the first two categories. The Report recommends that these should no longer be criminalised.

The Commission employs four principles, namely that the criminal law ought to: be clearly formulated, so that people know what is, and what is not, permissible; respect sexual autonomy; protect vulnerable people from exploitation; and apply without discrimination on grounds of gender or sexuality. These are all sound principles, and it is lamentable that Scots criminal law does not always conform to the first of these requirements in particular.

### B. MUCH-NEEDED REFORMS

#### (1) Rape

The Commission proposes that this be defined by statute as non-consensual penile penetration of the vagina, anus or mouth.<sup>7</sup> The inclusion of non-consensual oral and anal intercourse as "rape" is a change that is long overdue. A much criticised aspect of the current *mens rea* of rape is that a man who made a mistake about the complainant's

4 Scot Law Com No 209 (2007) available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk). Subsequent references to paragraph numbers and recommendations are to this Report unless otherwise indicated.

5 Para 1.12, citing Crown Office and Procurator Fiscal Service, *Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report and Recommendations* (2006) ([www.copfs.gov.uk/Resource/Doc/9/0000174.pdf](http://www.copfs.gov.uk/Resource/Doc/9/0000174.pdf)).

6 The figure of 3.9% is quoted in "Police to shake up rape-case tactics", *Scotland on Sunday*, 3 Feb 2008. The Commission will consider some aspects of evidence law in a future report: see S Wortley "Law reform after World's End" (2008) 12 EdinLR 293 at 294.

7 Recommendation 11.

lack of consent must be acquitted even if his error was wholly unreasonable.<sup>8</sup> It is sometimes suggested that the “mistaken belief” problem is mainly an academic concern, but even when not explicitly pled, the requirement for the Crown to prove that the accused knew the complainer was not consenting, and the fact that a belief in consent need not be reasonable, colours many rape cases.<sup>9</sup> The Commission’s proposal that a jury must take account of any steps which the accused took to find out whether there was consent follows reforms south of the border,<sup>10</sup> and is to be welcomed.<sup>11</sup>

## **(2) Consent to sexual activity (including intercourse)**

The Report recommends that consent be defined to mean “free agreement”,<sup>12</sup> and that there be included in legislation a non-exhaustive list of situations, proof of which is equivalent to proof of a lack of consent to sexual activity.<sup>13</sup> These had been referred to as “indicators” in the earlier Discussion Paper,<sup>14</sup> but the Commission has now recognised that this term is problematic. The first factual situation proposed is where the complainer has consumed a substance which resulted in a lack of capacity, and is aimed at complainers who are heavily intoxicated through drink or drugs. The second factual situation is where the complainer is unconscious or asleep at the time of the sexual activity. In each of these scenarios, proof that the complainer had consented at an earlier time to sexual activity in these particular circumstances would counter the conclusion of no consent.

Where there is violence or threat of violence against the complainer or a third party, and this causes the complainer to submit to the sexual activity, this also constitutes “no consent”, as would the fact that accused unlawfully detains the complainer, or deceives the complainer about the nature or purpose of the activity; or impersonates someone known to the complainer. If the only expression of agreement to the act is made by someone other than the complainer, this also constitutes “no consent”. The inclusion of these scenarios is a step in the right direction, and may help to change public attitudes towards what is acceptable in sexual relationships.

## **(3) Children**

At the heart of any reform of this aspect of the law is a tension; the law wants to protect children from sexual exploitation, but does not necessarily wish to criminalise adolescent “sexual fumbblings” (for want of a better term). Accordingly, the Commission proposes that there ought to be statutory offences of sexual penetration,

<sup>8</sup> *Jamieson v HM Advocate* 1994 JC 88; *Meek v HM Advocate* 1983 SLT 280.

<sup>9</sup> See e.g. *McKearney* (n 2). See also M Burman et al, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007) 46. In this study, four out of 75 notifications to the High Court of a defence of consent involved claims of a mistaken belief.

<sup>10</sup> Sexual Offences Act 2003 s 1.

<sup>11</sup> Recommendation 22.

<sup>12</sup> Recommendation 4.

<sup>13</sup> Recommendation 5.

<sup>14</sup> Discussion Paper on *Rape and Other Sexual Offences* (Scot Law Com DP No 131, 2006) para 3.49.

sexual assault and sexual activity involving children aged between 13 and 16, with the consent of the child not being a defence, but these offences are not to apply to perpetrators under the age of 16. It should, however, be a ground of referral to a children's hearing that a child has engaged in sexual activity.<sup>15</sup> Where the accused is less than two years older than the complainant, this is to be a defence to a charge of sexual activity (other than one involving penile penetration) with a child in this age group.<sup>16</sup>

#### **(4) New offences**

Several new offences are proposed, including that of causing a person to be present during, or to look at an image of, a sexual activity,<sup>17</sup> or to make a sexual communication to a person without consent. For each of these offences, the accused's purpose must be to obtain sexual gratification or to humiliate, distress or alarm another person.<sup>18</sup>

#### **(5) Equality**

The current law has a number of provisions designed to protect girls but not boys, and the Report rightly recommends that no such distinctions be maintained.<sup>19</sup> Similarly, it advocates the removal of offences which relate to homosexual conduct, other than those involving children, or a lack of consent.<sup>20</sup> Again, these reforms are long overdue.

### **C. SOME MISGIVINGS**

#### **(1) Impersonation**

Included among the factual situations which are tantamount to a lack of consent is where there has been impersonation. It will be rape if sexual intercourse occurs as a result of the accused having impersonated "a person known personally" to the complainant.<sup>21</sup> The Commission cites David Ormerod's question about the similar provision in English law: "A and B . . . arrange to meet (for the first time) after internet dating. A does not turn up at the date but X appears in his place pretending to be A".<sup>22</sup> Ormerod asks whether, if A and B have sexual intercourse, this should be treated as rape.<sup>23</sup> The situation could be regarded as rape, or as fraud, depending on the length of time between the deception and the intercourse, but it is not really adequate for the Commission merely to state that "a person known personally" is a phrase which "may require interpretation by the courts".<sup>24</sup> This goes against the Commission's own

<sup>15</sup> Recommendations 29 and 30.

<sup>16</sup> Recommendation 35.

<sup>17</sup> Recommendations 18 and 19.

<sup>18</sup> Recommendation 20.

<sup>19</sup> Recommendation 23.

<sup>20</sup> Recommendation 53.

<sup>21</sup> Section 10(2)(f) of the Bill.

<sup>22</sup> Para 2.76 n 54. The wording is the Commission's summary of Ormerod's question.

<sup>23</sup> D C Ormerod, *Smith & Hogan: Criminal Law*, 11<sup>th</sup> edn (2005) 611.

<sup>24</sup> Para 2.76.



assertion that the law ought to be clear, with sexual offences being defined “in such a way that what it prohibits is directly stated”.<sup>25</sup> To be sure, X will no doubt know that he is doing something which is highly immoral, and may even suspect that he lays himself open to prosecution for fraud. But if he is to be labelled a rapist as a result of his deception, he ought to be given fair warning of this.

## **(2) Incest**

No change is proposed to the law of incest, and so the Report does not discuss the rationale behind this crime.<sup>26</sup> This is a pity, since it is a crime which warrants further attention. If the current Scots law is based on the fact that incest is a practice which provokes widespread disgust, then this goes against the Commission’s avowed aim to ensure that where adults freely chooses to engage in a sexual activity, this should not be criminalised. If, however, exploitation is the justification for the prohibition, then there is surely merit in the suggestion in the Draft Criminal Code that the prohibition ought to be expanded to include sexual activities other than penile penetration of the vagina, including homosexual activity.<sup>27</sup> If the law is to remain unchanged, the current prohibition on incest ought to be re-enacted in the new legislation.<sup>28</sup>

## **(3) Indecent assault**

A new statutory offence of sexual assault is proposed, but the crime of indecent assault is not to be abolished. Rather, the common law crime is to remain as a sort of mopping-up device to cover “the possibility that someone who engages in an attack, but not of a type within the definition of sexual assault, should still be liable to be convicted of assault, and where the circumstances merit it, of indecent assault”.<sup>29</sup> The example they give is where A urinates on B, which may or may not be an indecent assault, depending on the circumstances. But why not treat this as a sexual assault if it passes the Commission’s suggested test of being an assault which “a reasonable person would consider to be sexual”?<sup>30</sup> If clarity is the aim, cognate offences should be contained in one statute, and it is regrettable that even after implementation of these proposals the law of sexual offences will continue to be a mix of common law and legislation.

## **(4) Sado-masochism**

There is no doubt that sexual sado-masochistic practices do occur at present. That they rarely result in prosecution is due to the fact that such consensual matters do not

<sup>25</sup> Para 1.24, where the Commission also says that “we favour classifying sexual offences according to the specific type of wrong which the prohibited act does to the victim”.

<sup>26</sup> The Commission does, however, include incest within its category of crimes whose aim is to safeguard or promote public morality. See paras 1.21 and 5.1.

<sup>27</sup> E Clive et al, *A Draft Criminal Code for Scotland with Commentary* (2003) s 67.

<sup>28</sup> The current provision is the Criminal Law (Consolidation) (Scotland) Act 1995 s 1.

<sup>29</sup> Recommendation 16.

<sup>30</sup> Recommendation 15.

generally come to the attention of the police.<sup>31</sup> A prosecution is likely to result only if someone goes further than the consent endorsed, or serious injury is caused.<sup>32</sup> The Commission recommends the decriminalisation of certain assaults to which parties have consented, and which are for the purposes of sexual gratification, but only where the behaviour in question is unlikely to result in serious injury. This is to be determined according to what the reasonable person would judge as being the likely outcome of the practice.<sup>33</sup> I have strong misgivings about this. For example, imagine that A bites B on the breast, strikes B's legs a couple of times with a belt, or ties B's wrists together. At present, each of these activities is an assault, even though no serious injury is caused (or was likely to be caused). Decriminalisation opens the door to pleas that this was done for the accused's (or even for the complainer's) sexual pleasure, and that the complainer consented. The Commission refers to the need to strike a balance "between the protection of a person's physical integrity and the promotion of sexual autonomy".<sup>34</sup> No mention is made of the danger of false claims of consent.

#### D. CONCLUSION

A great deal is expected from this Report, given the strength of feeling among many that the law is in desperate need of reform. It is easy to focus on the parts with which one disagrees. There are many commendable recommendations, and implementation of the Report will improve Scots criminal law in the area of sexual offences.

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### Sentencing Guidelines under section 118(7): *Lin v HM Advocate* and *Spence v HM Advocate*

Since 1995, the High Court has had the power to pronounce sentencing guidelines in appropriate cases, under section 118(7) of the Criminal Procedure (Scotland) Act 1995.<sup>1</sup> The main purpose of such guidelines is to promote consistency in sentencing

<sup>31</sup> See, however, *R v Brown* [1994] 1 AC 212.

<sup>32</sup> See e.g. *McDonald v HM Advocate* 2004 SCCR 161.

<sup>33</sup> Recommendation 57.

<sup>34</sup> Para 5.23.

<sup>1</sup> Henceforth the 1995 Act. Section 118(7) provides for guidelines in relation to solemn cases. A similar power in relation to summary cases is contained in s 198(7).

across the criminal courts. As such, section 118(7) provides that, when disposing of an appeal against sentence, “the High Court may, without prejudice to any other power in that regard, pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case”. Section 197 of the 1995 Act states that “a court in passing sentence shall have regard to any relevant opinion under section 118(7)”.

Section 118(7) came into force on 1 April 1996 and has almost never been used. The first – and indeed until recently the *only* – explicit use of section 118(7) was in *Du Plooy v HM Advocate*.<sup>2</sup> Here the court issued guidance on the level of discount to be applied where an offender has pled guilty, although this extended only as far as stating that the discount “should normally not exceed a third of the sentence which would otherwise have been imposed”.<sup>3</sup> To *Du Plooy*, one might add *Ogilvie v HM Advocate*,<sup>4</sup> where, although no explicit reference was made to section 118(7), the appeal against sentence was remitted to a larger court so that “guidelines” could be given on the appropriate sentence where an offender has downloaded indecent photographs of children from the internet.

By contrast, the body responsible for issuing sentencing guidelines in England and Wales, the Sentencing Guidelines Council (SGC), has been extremely active. In the four years since its inception,<sup>5</sup> it has issued ten sets of final guidelines, on subjects including sexual offences, domestic violence, robbery, manslaughter and reduction in sentence for a guilty plea. It has also issued draft guidelines in a further four areas, including sentencing in the magistrates courts and offences against the person.<sup>6</sup>

It might be said that this is not a fair comparison, as the process by which guidelines are issued in England and Wales differs from that in Scotland. Most importantly, there is no need for an appropriate case to arise before guidelines can be drawn up – the SGC can itself select areas in which to issue guidance or can respond to suggestions from the Home Secretary or the Sentencing Advisory Panel<sup>7</sup> – whereas the High Court in Scotland can issue guidelines only as part of an appeal before it. But even prior to the establishment of the SGC, when sentencing guidelines were the responsibility of the Court of Appeal, and thus could only be linked to appeals against sentence, it was far more common for guidelines to be issued by the English courts than the Scottish courts.<sup>8</sup>

2 2005 JC 1.

3 Para 26. For discussion, see F Leverick, “Making sense of sentence discounting: *Du Plooy v HM Advocate*” 2003 SLT (News) 265; F Leverick, “Tensions and balances, costs and rewards: the sentence discount in Scotland” (2004) 8 EdinLR 360.

4 2002 JC 74.

5 It was established by s 170 of the Criminal Justice Act 2003.

6 Guidelines are published on the Council’s website, at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

7 The body that provides advice to the SGC.

8 See Sentencing Guidelines Council, *Guidelines Judgments: Case Compendium* (2005), which draws together the sentencing guidelines issued by the Court of Appeal and lists 93 such judgments between 1990 and 2005.

It may be, however, that things are set to change, as in November 2007 the High Court issued two sets of sentencing guidelines under section 118(7) in the space of a week, in *Zhi Pen Lin v HM Advocate*<sup>9</sup> and *Spence v HM Advocate*.<sup>10</sup>

#### A. *LIN v HM ADVOCATE*

In *Lin*, the section 118(7) power was explicitly used for the first time in respect of a substantive offence. The appellant had pled guilty to an offence under section 4(2)(a) of the Misuse of Drugs Act 1971, the production of a controlled drug. He was an illegal immigrant who had been living and working in a cannabis ‘farm’. The operation was a large scale one, but the court described the appellant as a “gardener”, whose involvement was “minor”.<sup>11</sup> The maximum penalty for conviction on indictment for a section 4(2)(a) offence is 14 years imprisonment or an unlimited fine,<sup>12</sup> leaving considerable discretion to sentencing judges.

The appellant had been sentenced to three years and nine months imprisonment (discounted from five years due to his early guilty plea). Leave to appeal against sentence was granted and the case was identified as one in which it might be appropriate for the court to exercise its section 118(7) power, given that there had been “a degree of disparity”<sup>13</sup> in the sentences pronounced in similar cases in the past.

The guidance the court gave was that the appropriate starting point when sentencing “‘gardeners’ involved in relatively large scale operations” should be “in the range of 4 to 5 years’ imprisonment”.<sup>14</sup> As such, while the sheriff’s starting point for calculating the appellant’s sentence (five years) was “at the upper end of the range” and “on the severe side”, it was not excessive.<sup>15</sup>

The choice of four to five years as the appropriate starting point is higher than that in England and Wales, where the equivalent starting point is around three years.<sup>16</sup> The reason given for this was “the need to discourage a new development in this jurisdiction”.<sup>17</sup> If sentence levels do have a deterrent effect,<sup>18</sup> this may well discourage such developments in Scotland only for potential offenders to set up or move their operations to England, thus merely transferring the problem to another jurisdiction.

9 [2007] HCJAC 62, 2008 SCCR 16.

10 [2007] HCJAC 64, 2007 SLT 1218.

11 Para 12.

12 Misuse of Drugs Act 1971 Sch 4.

13 Para 10.

14 Para 13.

15 Para 14.

16 Para 13.

17 Para 13.

18 This has been doubted: see e.g. A von Hirsch, A Bottoms, E Burney and P-O Wilstrom, *Criminal Deterrence and Sentence Severity* (1999).

**B. SPENCE v HM ADVOCATE**

*Lin* was followed a week later by a second case invoking section 118(7), that of *Spence*.<sup>19</sup> Here, the appeal court fleshed out its earlier guidelines in *Du Plooy* on sentencing after a guilty plea.<sup>20</sup> The idea that guilty pleas should attract a discounted sentence is still controversial, but it is not the intention to examine its history or appropriateness here.<sup>21</sup> Suffice to say that under section 196 of the 1995 Act, sentencers are now required to take account of the fact and timing of a guilty plea in arriving at an appropriate sentence and to give reasons in open court if a discount is not applied.

The specific appeal point in *Spence* was whether it is ever appropriate to discount sentence where an offer to plead guilty to a lesser offence has not been accepted by the Crown, but the accused is ultimately convicted of that lesser offence. In *Spence*, the appellant had been charged with murder and had enquired about pleading guilty to culpable homicide. The Crown indicated this plea would not be acceptable, but when the case went to trial culpable homicide was the verdict returned by the jury.

On this narrow issue, the view of the court was that, contrary to earlier authority,<sup>22</sup> a sentence discount might sometimes be appropriate in such cases,<sup>23</sup> but it should only apply to those “tendering the plea and having it recorded at [a] procedural hearing and adhering to that position thereafter”.<sup>24</sup> Thus the appellant, who had merely “enquire[d] what would be the Crown’s position in the hypothetical event that a plea of guilty to culpable homicide were advanced”,<sup>25</sup> was not entitled to a sentence discount under the terms of section 196. Indeed, his sentence was *increased* from eight to ten years detention,<sup>26</sup> an outcome that might be seen as unfair, given that the court would have had no opportunity to do this but for its earlier decision that *Spence*’s appeal was arguable and that leave to appeal should be granted.<sup>27</sup>

The court went on to deal with the wider issue of the appropriate levels of discount to be granted under section 196. As in *Lin*, guidelines were felt to be necessary because there had been “inconsistencies” in the manner in which section 196 had been applied since *Du Plooy*.<sup>28</sup> The specific guidelines issued were that a discount of one third is appropriate for pleas tendered at the earliest possible stage (in solemn proceedings at a hearing arranged under section 76 of the 1995 Act specifically for this purpose); for a plea tendered at the first preliminary hearing (or first diet in the sheriff

19 *Lin* was decided on 2 November 2007; *Spence* on 9 November 2007. For a more detailed discussion of *Spence*, see F Leverick, “Sentence following a guilty plea: *Spence v HM Advocate* and *Leonard v Houston*” 2008 SLT (News) 43.

20 See text accompanying n 3 above.

21 See Leverick, “Tensions and balances” (n 3).

22 *Roberts v HM Advocate* 2005 SCCR 717 at para 10.

23 Para 9.

24 Para 10.

25 Para 10.

26 Para 19.

27 A point made by James Chalmers, in his on-line commentary on *Spence*, at [criminalletters.blogspot.com/2007/11/more-sentencing-guidelines-and.html](http://criminalletters.blogspot.com/2007/11/more-sentencing-guidelines-and.html).

28 For evidence of this, see N Orr, “*Du Plooy* deployed” 2007 SLT (News) 143.

courts) a discount of one quarter is appropriate and for a plea tendered at trial diet, any discount awarded should not exceed ten per cent and “in some circumstances may be less than that or nil”.<sup>29</sup> Whether intentional or not, the guidance is effectively identical to that issued by the Sentencing Guidelines Council in England and Wales.<sup>30</sup>

### C. DISCUSSION

In 2003, the Scottish Executive established a Sentencing Commission for Scotland, whose remit was to make recommendations on, *inter alia*, “the scope to improve consistency in sentencing”.<sup>31</sup> In its report, the Commission admitted to being unclear as to why the appeal court issued sentencing guidelines so rarely and recommended that greater use should be made of section 118(7).<sup>32</sup> Most of the Commission’s recommendations, which included the creation of an Advisory Panel on Sentencing in Scotland, have yet to be implemented. It may be, though, that *Lin* and *Spence* are a sign that the section 118(7) power *will* now be used more frequently.

One factor that might encourage the appeal court to issue sentencing guidelines is the increased sentencing power of the sheriff court. On 1 May 2004, the maximum sentence of imprisonment that could be imposed by a sheriff in a solemn case was increased from three to five years.<sup>33</sup> Until then, sentences of imprisonment greater than three years could only be imposed by High Court judges, a relatively small and geographically close community who could potentially minimise sentencing disparities through informal discussion. This clearly is not possible in the sheriff courts, of which there are 49 spread throughout Scotland.

It must be said that the increased sentencing power of the sheriff court was not the justification for the guidelines issued in *Lin*, where reference was made to “a degree of [sentencing] disparity ... in the High Court”<sup>34</sup> in cases of cannabis cultivation. However, given the range of sentences in the cases cited to illustrate this point,<sup>35</sup> many future prosecutions of “cannabis gardeners” – or indeed other prosecutions that would previously have taken place in the High Court – are now likely to take place in the sheriff courts. Research undertaken into the impact of the increased sentencing power estimated that around 100 to 150 cases per year would be taken out of the High Court to be prosecuted in the sheriff courts.<sup>36</sup> Whether this

29 Para 14. The guidance was issued in the context of solemn proceedings but *Leonard v Houston* 2008 JC 92 suggests that similar levels of discount apply to summary cases. See Leverick (n 19).

30 *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) para 4.3.

31 Sentencing Commission for Scotland, *The Scope to Improve Consistency in Sentencing: Report* (2006) para 1.3. The Commission was disbanded in November 2006, having achieved this (and its other) aims.

32 Para 9.11.

33 1995 Act s 3(3), as amended by s 13 of the Crime and Punishment (Scotland) Act 1997 (which was not brought into force until 2004).

34 Para 10, emphasis added.

35 Which ranged from three years to four years six months.

36 J Chalmers, P Duff, F Leverick and Y Melvin, *An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004* (2007) para 10.9.

means that more extensive use of section 118(7) can be expected in future remains to be seen.

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## Delay, Expediency and Judicial Disputes: *Spiers v Ruddy*

The recent decision of the Judicial Committee of the Privy Council in *Spiers v Ruddy*<sup>1</sup> harmonises the position across the UK where the Crown has failed to bring a person accused of a criminal charge to trial within a reasonable time, and this breach of the reasonable time guarantee is established prior to the conclusion of proceedings.

Previously, the legal response to such cases had diverged between Scotland and the rest of the UK.<sup>2</sup> In *R v HM Advocate*,<sup>3</sup> the Judicial Committee had held that there was no alternative to halting the prosecution in such circumstances. Proceeding further, it was said, would be in breach of section 57(2) of the Scotland Act 1998, which bars the Lord Advocate from doing any act incompatible with Convention rights. That decision was reached by a majority, with the three Scottish members of the Judicial Committee – Lords Clyde, Hope of Craighead and Rodger of Earlsferry – prevailing over Lords Steyn and Walker of Gestingthorpe.

Shortly afterwards, the issue arose again, but this time in respect of proceedings in England. Given the split of opinion in *R*, a decision was taken that the issue should go before a nine-judge court, including two of the majority in *R* (Lords Hope and Rodger).<sup>4</sup> This second case was *Attorney-General's Reference (No 2 of 2001)*,<sup>5</sup> where seven of the judges declined to adopt the approach of the *R* majority. For those judges, a breach of the reasonable time guarantee was itself a violation of the Convention and required a remedy, but it did not make further proceedings unlawful in terms of section 6(1) of the Human Rights Act 1998. Furthermore, the majority concluded, a stay of proceedings was not the appropriate remedy unless “(a) there [could] no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant”.<sup>6</sup>

1 [2007] UKPC D2, 2008 SLT 39.

2 For discussion, see C Himsworth, “Jurisdictional divergences over the reasonable time guarantee in criminal trials” (2004) 8 EdinLR 255.

3 [2002] UKPC D3, 2003 SC (PC) 21.

4 See Himsworth (n 2) at 256.

5 [2003] UKHL 68, [2004] 2 AC 72.

6 *Attorney-General's Reference* at para 24 per Lord Bingham.

Lords Hope and Rodger disagreed with this approach, but reached differing results. Both considered that a trial which did not take place within a reasonable time had to be regarded as unlawful, but that the Human Rights Act did not have the same absolutist consequences as section 57(2) of the Scotland Act. In Lord Rodger's view, it was therefore possible to reach the same result as the majority, but Lord Hope said that the matter was one for the discretion of the court, and it was "arguable that a stay of the proceedings is the ordinary and appropriate remedy".<sup>7</sup>

### A. THE DECISION

The most remarkable thing about *Spiers v Ruddy* is the brevity of the judgments. There were a total of 168 paragraphs in *R* and 179 in *Attorney-General's Reference*: in *Spiers v Ruddy*, there are 29. Lord Hope, whose speeches in those two cases were 62 and 66 paragraphs long respectively, takes five paragraphs to depart from his previously expressed views. Lord Rodger takes just four to depart from arguments that previously required 51 and 39 paragraphs.

The appeal centres on a number of Strasbourg decisions, dating from 2000 onwards, which were not considered in either *R* or *Attorney-General's Reference*. The Strasbourg cases, which are concerned with the appropriate remedy for a breach of the reasonable time guarantee, refer to such a remedy preventing either "the alleged violation or its continuation".<sup>8</sup> It is this phrase which forms the basis for the change of heart by Lords Hope and Rodger in *Spiers v Ruddy*, but they do not adopt exactly the same approach. Instead, their earlier divergence in *Attorney-General's Reference* leaves them treading different paths.

For Lord Hope, the recent Strasbourg cases require a new interpretation of article 6(1), because "[i]t is plain that there can be no incompatibility between the Convention right and that which is regarded as appropriate for the purposes of article 13 as an appropriate remedy".<sup>9</sup> But that approach is not easily available to Lord Rodger, who was prepared to countenance an incompatibility between rights and remedies in *Attorney-General's Reference*.<sup>10</sup> Instead, his conclusion is that the reference to a remedy preventing a "continuation" of a breach of the guarantee means it can no longer be said that "the prosecutor is, inevitably, in continuing breach of article 6(1) once he has delayed unduly".<sup>11</sup>

Whether this is actually new law given earlier Strasbourg jurisprudence is doubtful,<sup>12</sup> but leaving that aside, it is clear that on either approach the decision in *R* can no longer stand. This significantly weakens the protection offered by the reasonable time guarantee. It returns Scots law to a position broadly similar to that

<sup>7</sup> *Attorney-General's Reference* at para 110.

<sup>8</sup> *Kudla v Poland* (2002) 35 EHRR 11 at para 158 (emphasis added).

<sup>9</sup> *Spiers v Ruddy* at para 23.

<sup>10</sup> At least those remedies available under the Human Rights Act 1998.

<sup>11</sup> *Spiers v Ruddy* at para 26.

<sup>12</sup> See the cases noted by Lord Bingham in *Attorney-General's Reference* at para 23.



applying prior to the Scotland Act 1998, where the accused could (as he still can) plead oppression in bar of trial in such circumstances, but only if it could be shown that he could no longer receive a fair trial.<sup>13</sup> Because of this requirement, the plea rarely succeeded.<sup>14</sup>

Lords Hope and Rodger do not seem to contemplate arguing that the language used in the more recent Strasbourg cases is wrong or misleading: in Lord Hope's words, "[i]n this matter, of course, the last word must lie with Strasbourg".<sup>15</sup> It is, of course, established that domestic courts should not "outpace" the Strasbourg jurisprudence,<sup>16</sup> but it does not follow from this that they should give quite this much weight to three words on which no Strasbourg decision cited in *Spiers v Ruddy* appears to have itself turned.

## B. MANAGING JUDICIAL DISPUTES

But it may be wrong to treat *Spiers v Ruddy* as a decision turning on legal principle. Instead, perhaps, it is a pragmatic resolution to a messy divergence of views amongst members of the United Kingdom's highest courts. The recent Strasbourg jurisprudence, whether or not it radically changed the nature of the article 6(1) right, allows Lords Hope and Rodger to recant with honour.

While it may be perfectly acceptable to have different interpretations of the law applying in the different United Kingdom jurisdictions, it is unsatisfactory for such divergences to arise and be perpetuated purely because of the manner in which the highest appellate court happens to be constituted in a particular case. Nor would it be appropriate to operate as if the Scottish law lords (or members of the Judicial Committee) themselves formed a Scottish supreme court to which their non-Scottish colleagues were required to defer in respect of devolution issues.<sup>17</sup>

The decision in *Attorney-General's Reference*, it was accepted, did not affect the validity of the decision in *R*.<sup>18</sup> But that result obtains only because of a specific statutory provision,<sup>19</sup> and it has since been held that it is at least possible for the Judicial Committee to overrule a decision of the Appellate Committee. In *Attorney-General for Jersey v Holley*,<sup>20</sup> the Judicial Committee revisited the vexed question of the appropriate definition of the defence of provocation under English law,

<sup>13</sup> *McFadyen v Annan* 1992 JC 53.

<sup>14</sup> See *HM Advocate v H* 2000 JC 552 at 553 per Lord Bonomy.

<sup>15</sup> *Spiers v Ruddy* at para 21.

<sup>16</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at para 20 per Lord Bingham; *Whaley v Lord Advocate* [2007] UKHL 53, 2007 SLT 1209 at para 18 per Lord Hope.

<sup>17</sup> On these points, see generally J Chalmers, "Scottish appeals and the proposed Supreme Court" (2004) 8 EdinLR 4. See also *Davidson v Scottish Ministers* 2006 SC (HL) 41 at para 38 per Lord Hope.

<sup>18</sup> See *Attorney-General's Reference* at para 102 per Lord Hope.

<sup>19</sup> Section 103(1) of the Scotland Act 1998, which provides that "[a]ny decision of the Judicial Committee in proceedings under this Act... shall be binding in all legal proceedings (other than proceedings before the Committee)".

<sup>20</sup> [2005] UKPC 23, [2005] 2 AC 580. See J Elvin, "The doctrine of precedent and the provocation defence" (2006) 69 MLR 819.

something which had already troubled the Appellate Committee in a number of cases culminating in the heavily criticised *R v Smith (Morgan)*.<sup>21</sup>

It was expressly acknowledged in *Holley* that “an enlarged board of nine members” had been convened “to resolve this conflict and clarify definitively the present state of English law, and hence Jersey law, on this important subject” – something which was possible because the two were accepted as being the same.<sup>22</sup> The Court of Appeal has since accepted that *Holley* should be treated by the English courts as having overruled *Smith*.<sup>23</sup>

This issue of cross-court precedent will not be a live one for much longer within the UK given the provisions of the Constitutional Reform Act 2005, which will create a Supreme Court for the United Kingdom. That court will assume both the existing jurisdiction of the Appellate Committee and of the Judicial Committee in respect of devolution matters.<sup>24</sup> At present, it is expected that the court will be operational from early 2009.<sup>25</sup> Section 41 of the Act provides that:

- (2) A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom.
- (3) A decision of the Supreme Court on a devolution matter –
  - (a) is not binding on that Court when making such a decision;
  - (b) otherwise, is binding in all legal proceedings.<sup>26</sup>

This seems intended to maintain the jurisdictional demarcation which currently exists between the Judicial Committee (in respect of devolution issues) and the Appellate Committee, but it is an awkward provision, particularly in the context of a unified court. On one reading, section 41 might suggest that if a decision such as *R* turned purely on the proper construction of the Convention and not on section 57(2) of the Scotland Act 1998, then it would be binding in “all legal proceedings” and it would not be open to the court to depart from that construction in a case such as *Attorney-General’s Reference*. But it is difficult to see any principled reason for that conclusion, which would represent a move towards non-reviewable binding precedent of the type repudiated by the 1966 Practice Statement.<sup>27</sup>

21 [2001] 1 AC 146. The most damning critique is J Gardner and T Macklem, “Compassion without respect? Nine fallacies in *R v Smith*” [2001] Crim LR 623.

22 *Holley* at para 1 per Lord Nicholls of Birkenhead. See also para 68 per Lord Bingham of Cornhill and Lord Hoffmann.

23 *R v James* [2006] EWCA Crim 14, [2006] QB 588.

24 Constitutional Reform Act 2005 s 40.

25 Subject, it seems, to construction of the new premises: see HL Deb 14 Jul 2007, col WS119.

26 A devolution matter is defined in s 41(4) as “(a) a question referred to the Supreme Court under section 33 of the Scotland Act 1998 (c 46) or section 11 of the Northern Ireland Act 1998 (c 47); (b) a devolution issue as defined in Schedule 8 to the Government of Wales Act 1998 (c 38), Schedule 6 to the Scotland Act 1998 or Schedule 10 to the Northern Ireland Act 1998”.

27 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

Perhaps, then, “a decision on a devolution matter” in a case such as *R* means only the narrow question of (for example) “whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law”.<sup>28</sup> That, however, could – for example – lead the Supreme Court to handing down a (binding) decision that *X* was compatible with Convention rights while maintaining a (still binding) position that it would be incompatible with Convention rights for the Lord Advocate to do *X*.

### C. CONCLUSION

Perhaps the two most important consequences of the Scotland Act 1998 were the ruling that proceedings before temporary sheriffs were invalid,<sup>29</sup> along with the newly strict approach taken to the prevention of delay in trials.<sup>30</sup> Within a very short period, however, it has been held that proceedings before temporary sheriffs were not actually invalid after all (although the point is now largely academic),<sup>31</sup> and now, in *Spiers v Ruddy*, that the enhanced protection against delay was merely a temporary illusion.

Beyond that, *Spiers v Ruddy* highlights the tensions which arise from the overlapping jurisdiction of the Appellate and Judicial Committees over different jurisdictions, tensions which are unlikely to disappear with the creation of a Supreme Court. The consequences of section 41(3) of the Constitutional Reform Act 2005 are less than clear, meaning that the law of cross-border precedent will, as before, be largely left to the court to develop.

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## “A Stitch in Time”? Repairs and Rejection in Sale of Goods

Section 35(6)(a) of the Sale of Goods Act 1979 provides that:

The buyer is not by virtue of this section deemed to have accepted the goods merely because –

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller . . .

<sup>28</sup> Scotland Act 1998 Sch 6 para 1(d).

<sup>29</sup> *Starrs v Ruxton* 2000 JC 208.

<sup>30</sup> Outside of cases where the accused is remanded in custody pending trial, where the Scottish rules were and remain remarkably strict by comparative standards. See generally J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 16.

<sup>31</sup> *Dickson v HM Advocate* [2007] HCJAC 65, 2008 SLT 12 (holding that such proceedings, while incompatible with the Convention, were saved by s 6(2) of the Human Rights Act 1998).

This provision was introduced into the Sale of Goods Act 1979 in 1994<sup>1</sup> because of a concern that a buyer who permitted the repair of defective goods was acting in way which indicated an “acceptance ... of the goods”,<sup>2</sup> with the consequence that he lost his right to reject them.<sup>3</sup> Subsequent reforms to the Sale of Goods Act 1979 have further entrenched the idea of “repair” as a remedy, at least in consumer cases.<sup>4</sup> However, rejection remains the buyer’s most powerful weapon where goods are of defective quality, contrary to section 14.

Some thirteen years after its introduction, section 35(6)(a) was considered by the House of Lords, on appeal from the Inner House,<sup>5</sup> in the unusual case of *J & H Ritchie Ltd v Lloyd Ltd*.<sup>6</sup> What is interesting about the case is the very different approaches taken by the Inner House and the House of Lords to section 35(6)(a). The case concerned the effect on the buyer’s right of rejection of the seller’s refusal to inform the buyer of a defect in goods after they were repaired.<sup>7</sup>

### A. FACTS

Ritchie purchased a “seed drill and power harrow” from Lloyd, pursuant to a contract of sale, for approximately £14,200 on 4<sup>th</sup> March 1999. The equipment was not used until 26<sup>th</sup> April 1999, as it had “seasonal” usage. The next day, there was a vibration in the harrow. Nothing seemed obviously wrong upon looking at the harrow, so Ritchie continued to use it that day. The vibration continued on the day after, and so Ritchie took the view that there was something seriously wrong with the equipment, and desisted from using it. Ritchie had a telephone discussion with Lloyd, and a replacement harrow was delivered the next day. This was used to complete the “tilling and sowing”.

The defective harrow was taken to Lloyd’s premises for inspection and repair. It was discovered that the cause of the vibration was two missing “bottom bearings”, which had been omitted when the harrow was manufactured. This was a serious defect, which would have allowed the equipment to have been rejected, under section 15B, as being of unsatisfactory quality, contrary to section 14(2).

When the harrow was returned to Ritchie, it was too late to test it that year, meaning that it would need to be stored until the next year. Lloyd did not tell

1 Sale and Supply of Goods Act 1994 s 2.

2 Sale of Goods Act 1979 s 35(1)(a) (regarding intimating “acceptance”) and s 35(1)(b) (concerning “inconsistent” usage). All subsequent section references are to this Act.

3 Report on *Sale and Supply of Goods* (Law Com No 160, Scot Law Com No 104 (1987), available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) paras 5.27-5.29.

4 See Part VA of SOGA.

5 2005 1 SC 155.

6 [2007] UKHL 9, 2007 SC (HL) 89. The case has also been commented upon by, amongst others, K F K Low, “Repair, rejection and rescission: an uneasy resolution” (2007) 123 LQR 536; K C F Loi, “Sale of goods in Scotland – repairing defects in the law” [2007] JBL 807; M Bridge, “Sale of goods in Scotland – a second tender” [2007] JBL 814; D Carr, “Repairs, refusals and rejections” (2007) 66 CLJ 498; and J M Thomson, “A simple case?” 2007 JR 241.

7 *Ritchie* at para 13 per Lord Hope.

Ritchie what the problem with the harrow was when asked, and refused to allow an engineer's report. Ritchie was simply told that the repaired harrow was now of "factory gate specification" (i.e., good as new).<sup>8</sup> Ritchie had found out, on an informal basis, what had been wrong with the harrow. This gave rise to three concerns on Ritchie's part: first, that the lack of bearings could have harmed the harrow "in other ways";<sup>9</sup> secondly, there was no chance to see if the difficulty had been properly cured; and, thirdly, the effect this time gap would have on "the manufacturer's guarantee".

Consequently, Ritchie rejected the equipment. Lloyd did not accept the rejection, and argued that, as the harrow was now "factory gate standard", Ritchie was obligated "to accept the equipment", pursuant to section 27.<sup>10</sup> Ritchie successfully sued Lloyd for rescission and repayment of the price in the sheriff court, but this decision was overturned by the sheriff principal, whose decision was upheld by a majority of the Inner House. That latter decision was unanimously overturned in the House of Lords.

### B. INNER HOUSE DECISION

The majority in the Inner House adopted a "constructionist" approach, in which it sought to apply the words of section 35(6)(a) to the problem.<sup>11</sup> They took the view that after the goods had been repaired and were said to be "satisfactory" by the seller, the buyer, who had not tested the goods, could not subsequently reject them without showing that, after the repair, the goods were not of "satisfactory quality" – the initial right of rejection was lost.<sup>12</sup> However, the buyer had a subsequent right of rejection when the repaired goods were restored to the buyer. In essence, the majority regarded the matter, effectively, as being one which equated to a buyer permitting the goods to be delivered "out of time".<sup>13</sup>

Lord Marnoch dissented, as he did not believe that the initial right to reject had been lost when the goods were put in for repair, and felt there could not be "a second or later tendering" of the same or different goods.<sup>14</sup>

### C. HOUSE OF LORDS

It was held by the House of Lords that Ritchie had not lost their right to reject simply because they had entered into "an arrangement" to send the goods to be repaired.<sup>15</sup>

Unlike the Inner House, the Law Lords did not feel that the words of section 35(6)(a) could provide the answer to the problem before them. Consequently, their Lordships felt that one had to go outside the "statutory code", and imply a contractual

<sup>8</sup> *Ritchie* at para 9 per Lord Hope.

<sup>9</sup> *Ritchie* at para 6.

<sup>10</sup> *Ritchie* 2005 1 SC 155 at para 7.

<sup>11</sup> See the criticism of this approach by Lord Brown: *Ritchie* at para 44; see also Lord Hope at para 13.

<sup>12</sup> For the views of the majority as outlined in this paragraph see *Ritchie* 2005 1 SC 155 at paras 37, 40, 44, 45, and 48 per Lord Hamilton and at paras 51 and 55-57 per Lord Philip.

<sup>13</sup> *Ritchie* at para 43 per Lord Brown. See *Ritchie* 2005 1 SC 155 at para 45 per Lord Hamilton.

<sup>14</sup> *Ritchie* 2005 1 SC 155 at para 12.

<sup>15</sup> See *Ritchie* at paras 16-19 per Lord Hope, at paras 34-35 and 37 per Lord Rodger, at paras 41-43 and 45 per Lord Brown and at paras 48-49 and 52-54 per Lord Mance.

term that Lloyds were required to provide “information” regarding the fault with the harrow and what was done to repair it, to Ritchie before Ritchie could decide whether to accept the repaired item or not.<sup>16</sup> Hence, the purchaser could not be presented with a *fait accompli* with regard to the repaired goods.<sup>17</sup>

However, there was some disagreement as to what contract the term was to be implied into. Lord Rodger, Lord Brown and Lord Mance did not regard the term as being implied into the sale contract, but, rather into a separate, but related, agreement “to inspect and possibly repair” the harrow (the “inspect and repair arrangement”). Lord Rodger regarded this agreement as “some kind of innominate contract”, as there was no charge for the repair.<sup>18</sup> Lord Hope, by contrast, sought to imply a term, regarding information about the repair, into the sale contract, and, consistently with that view, held that section 35(2)(a), regarding the buyer having “a reasonable opportunity” to examine goods to see if they comply with the sale contract, applied to the repaired harrow.<sup>19</sup> Lord Scott, whom it is understood initially raised the issue of an implied term in argument, ironically agreed with all his brethren.<sup>20</sup>

Whilst the basis for implying the implied term was the traditional one of providing the contract with business efficacy, as a matter of necessity,<sup>21</sup> the rationale for such implication varied amongst their Lordships. Lord Hope looked at it in terms of the seller making “a properly informed choice”.<sup>22</sup> However, Lord Rodger saw Lloyd’s conduct as undermining trust and confidence with respect to contractual performance.<sup>23</sup> Lord Brown, whilst was also critical of Lloyd’s “thoroughly unreasonabl[e]” conduct, which was “not sensible commercial practice”,<sup>24</sup> ultimately saw the matter in terms of an entitlement to an “assurance that the repairs have been properly carried out”.<sup>25</sup> And Lord Mance saw the matter in terms of an implicit and expected procedure regarding disclosure of the harrow’s problem, prior to the buyer continuing on with the repair, as the buyer could have decided at that point to reject the goods.<sup>26</sup> Despite these differences, the result was Ritchie could reject the goods.

16 *Ritchie* at paras 13-19 per Lord Hope, paras 34-37 per Lord Rodger, paras 44-45 per Lord Brown, and paras 51-54 per Lord Mance. Lord Scott agreed with all the speeches: *Ritchie* at para 21.

17 *Ritchie* at para 53 per Lord Mance.

18 *Ritchie* at para 32.

19 *Ritchie* at paras 15 and 16. See too Lord Hamilton and Lord Philip, in the Inner House: *Ritchie* 2005 1 SC 155 at paras 44 and 57 respectively.

20 *Ritchie* at para 21. Cf Lord Brown who, curiously, agreed with the “reasons . . . given by Lord Hope and . . . Lord Rodger of Earlsferry”: para 46.

21 *Ritchie* at paras 34 and 37 per Lord Rodger and at para 14 per Lord Hope, quoting, with approval, Lord Cross of Chelsea in *Liverpool City Council v Irwin* [1977] AC 239 at 258.

22 *Ritchie* at paras 16 and 19. His Lordship adopted a similar approach to Hale LJ in *Clegg v Andersson t/a Nordic Marine* [2003] 2 Lloyd’s Rep 32 at para 75.

23 *Ritchie* at para 37.

24 *Ritchie* at para 41.

25 *Ritchie* at para 45.

26 *Ritchie* at paras 52-54.

#### D. COMMENTARY

It is clear that their Lordships greatly disapproved of Lloyd's actions, and one senses they were keen to rectify what they saw as an obvious injustice. Allied to this, there is, running through the speeches,<sup>27</sup> the idea of giving effect to the parties' – or, here, one party's – "reasonable expectations" by means of an implied term based on co-operation.<sup>28</sup>

In relation to the two lines of reasoning concerning implication – namely, whether one implies a term into the sale contract, or into a separate contract relating to inspecting and repairing the goods – both achieved the desired result in this case. With regard to implication into the sale contract, it is suggested that this is a narrower basis for implication and deals with the case's key issue – had the buyer's right to reject the goods under the sale contract been lost, in the circumstances?<sup>29</sup> It is a neat, thoughtful and easy-to-apply solution; it is also less abstracted from the 1979 Act than implication into a second contract. However, as was acknowledged, it was not intended to deal with more general issues relating to the repair itself.<sup>30</sup>

In contrast, the separate contract approach, (i.e., the "inspection and possible repair" contract) – for which provision is made in section 35(6)(a) by reference to the goods being repaired "under an arrangement" – involves a broader approach, with its delineation between the two separate processes of sale and repair. It also looks at issues going beyond the instant case in relation to the repair itself, and so, with respect, will be of more general application.

By way of general comment, it is suggested that the "inspection and repair" contract is akin to a collateral contract under English law. Whilst there is no payment for the repair, there is consideration, in the English law sense, as Ritchie forebore from rejecting the goods initially, which would have cost Lloyd money, and allowed them to be repaired.<sup>31</sup> In Scots law terms, it is suggested that, as an alternative, one can analyse permitting the goods to be repaired as being a suspensive condition under the sale contract regarding the right to reject.<sup>32</sup> If the goods are repaired properly, then the right to reject falls away (as the condition is satisfied); if not, then the right to reject is revived.

Despite its unusual facts, and the different reasoning, the *Ritchie* case, does, nonetheless, provide useful guidance on section 35(6)(a) (and, it is suggested, Part VA of the 1979 Act) for lawyers in Scotland and England. In the first instance, the case establishes two main propositions, which all of their Lordships agreed on, namely: (i) that a buyer who has returned the goods to the seller to have them repaired is entitled

<sup>27</sup> *Ritchie* at paras 18, 21, 37 (Lord Rodger's clock example), 41, 45 and 52-54.

<sup>28</sup> See J Steyn, "Contract law: fulfilling the reasonable expectations of honest men" (1997) 113 LQR 433 at 433 and 441, especially Lord Steyn's second category of implied term.

<sup>29</sup> *Ritchie* at para 13.

<sup>30</sup> Para 19. A similar general point is made by Thomson (n 6) at 244, who sees the implication as "deliberately fact-specific", and so not universal.

<sup>31</sup> As to forbearance as consideration: see H Beale (ed), *Chitty on Contract: General Principles*, 29<sup>th</sup> edn (2004) paras 3-046 ff. Cf Thomson (n 6) at 246.

<sup>32</sup> It is understood that a similar view was taken by senior counsel for the respondents. See also *Ritchie* at para 48 per Lord Mance, who speaks of a "conditional" acceptance.

to know what was wrong with the goods and what was done to rectify them;<sup>33</sup> and (ii) that such a buyer's right to reject is not lost by having entered into "an arrangement" to send the goods to be repaired, as the goods have not been accepted.<sup>34</sup>

In the second instance, which is linked with the next three instances, it is clear, based on the majority view, that any analysis of section 35(6)(a) will now also need to be in terms of a "repair contract", which is connected with, but separate from, the original sale contract, and which, necessarily, is heavily laced with implied terms.<sup>35</sup> Thirdly, following on from this, it is implicit in the repair agreement that, provided the seller (or its agent) is repairing the goods satisfactorily, the buyer cannot terminate the sale contract.<sup>36</sup> Fourthly, it is also implicit in the "repair contract" – providing, one assumes, there is disclosure concerning the nature of the defect and the repair – that if the repair has been satisfactorily carried out, then the buyer cannot use the initial defect to terminate the sale contract.<sup>37</sup> Lastly, if however the seller decides not to carry out the repair, this is a "repudiatory breach" of the "repair contract", which allows rescission of the sale contract owing to the initial defect.<sup>38</sup>

Thus, the *Ritchie* case is an example of "judicial gap-filling", in which the court, by means of a series of implied terms, has indicated to parties involved in a repair situation, without a formal contract, what is expected of them, and what the consequences are if they do not meet those expectations. In these respects, the decision is to be welcomed.

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## Conflicting Interpretations of a Relationship: Damages for Human Rights Breaches

The reason why the *Somerville* case<sup>1</sup> reached the front page of *The Scotsman*<sup>2</sup> in October 2007 was that the compensation which would, as a result of the decision, become payable to prisoners and former prisoners in Scottish jails because of their

<sup>33</sup> See n 16.

<sup>34</sup> See n 15.

<sup>35</sup> A similar point regarding the number of implied terms is made by Thomson (n 6) at 245 and 246.

<sup>36</sup> *Ritchie* at para 34 per Lord Rodger (who delivered the leading "majority" speech); Lords Scott and Brown agreeing at paras 21 and 46 respectively.

<sup>37</sup> *Ibid.* This is similar to the Inner House's view: see section B above.

<sup>38</sup> *Ritchie* at para 35 per Lord Rodger, Lords Scott and Brown agreeing at paras 21 and 46 respectively.

1 *Somerville v Scottish Ministers* [2007] UKHL 44, 2007 SLT 1113. Unattributed paragraph numbers in subsequent footnotes refer to this decision.

2 25 Oct 2007.



endurance of “slopping-out” regimes was expected to rise to £70m. In fact the *Somerville* case was not about slopping out but the compatibility of prison segregation rules with Convention rights. The case itself turned,<sup>3</sup> though, on the question of whether the rule in section 7(5) of the Human Rights Act 1998 which normally requires proceedings to be brought within a period of a year applies with equal force both to proceedings expressly brought under that Act and to proceedings brought against the Scottish Executive (or Government) in reliance upon the Scotland Act 1998. In the Outer House, Lady Smith had held that the time bar did not apply.<sup>4</sup> The First Division had held that it did.<sup>5</sup> Now, the House of Lords has, by a majority of three to two, vigorously reversed the Division: hence the revived hopes of all the other prisoners whose actions had been suspended in the light of the Inner House’s decision.

### A. THE BACKGROUND

During the parliamentary proceedings on the Bill which became the Human Rights Act 1998, the then Lord Chancellor had to respond to a proposed amendment which would have affected the right of a Scottish Minister to be joined in proceedings when a court was considering the making of a declaration of incompatibility in relation to a provision in a UK Act of Parliament. This proposal, he said, raised a question of the “linkage” between the Human Rights Bill and the Scotland Bill, both of which were passing through Parliament at the same time. The Lord Chancellor assured his noble audience that the Government had been “looking with care at how and where they interlink[ed]”.<sup>6</sup>

Whilst it may be the case that many points of potential “interlinkage” were indeed treated with some care and resolved in such a way as to remove any subsequent doubts, this has proved to be not universally true. Clearly there had to be the prospect of some degree of consistency and coherence between the operation of the two statutes, one of which was designed to render unlawful anything done by any public authority in the United Kingdom which was incompatible with a Convention right and the other of which was to place limits on the competence of the new Scottish Parliament and Scottish Executive, also by reference to compatibility with Convention rights.

On one view, the two statutes could be seen simply as reflecting two overlapping aspects of the same scheme. The Human Rights Act provided the core rules while

3 The case involved a number of complex, inter-related issues. By the House of Lords stage, these had become five: the relationship between the Scotland Act and the Human Rights Act; the relationship between prison governors and the Scottish Ministers; the question of when time begins to run for Human Rights Act purposes; proportionality (left for another time); and judicial inspection of documents protected by public interest immunity certificates.

4 [2005] CSOH 24.

5 [2006] CSIH 52, 2007 SC 140. The Inner House decision was heavily criticised by I Jamieson, “The *Somerville* case” 2007 SLT (News) 111, in terms subsequently adopted into the arguments developed in the House of Lords: *Somerville* at para 92 per Lord Rodger. See also n 29 below.

6 HL Deb 19 Jan 1998, col 1318. See also C Himsworth, “The hamebringing: devolving rights seriously”, in A Boyle et al (eds), *Human Rights and Scots Law* (2002) 19.

the Scotland Act (and the Government of Wales Act 1998 and the Northern Ireland Act 1998) filled in the special rules applicable to the devolved institutions,<sup>7</sup> including their capacity to operate on the implementation of devolution in stages during 1999, ahead of the eventual full implementation of the Human Rights Act from October 2000. This view of a single, integrated scheme for the implementation of human rights protection gains some support from specific provisions in the Scotland Act. Section 126(1) ensures that “the Convention rights” has the same meaning as in the Human Rights Act.<sup>8</sup> Sections 100(1) and (2) provide that in proceedings brought to uphold a Convention right, other than those involving a Law Officer, a person must satisfy the “victim” test of article 34 of the ECHR, as in proceedings under the Human Rights Act. And section 100(3) denies the possibility of the award of damages in such proceedings except where also permitted, as “just satisfaction”, under section 8 of the Human Rights Act.

Taking an integrationist view still further, it is possible to argue that the logic of these specific provisions, designed to ensure compatibility between the two statutes, also demands the extension of integration into the operation of the time bar imposed by the Human Rights Act as well. On this view there is really a single scheme for human rights protection, to which access may be gained by either of the two Acts, and integrated rules should be assumed.

### B. SOMERVILLE IN THE COURT OF SESSION

There is a considerable attraction to the logic of this position. It was essentially that adopted by the Inner House. They said that the two Acts should be construed as “part of a single constitutional settlement”.<sup>9</sup>

In coming to the conclusion they did, however, the Inner House had to reject and overturn the arguments which had found favour with Lady Smith and which represent the application of a different logic to the relationship between the two statutes.<sup>10</sup> This acknowledges the connections and overlaps between the two schemes but concludes nevertheless that there are also differences between them and that among these is the time bar rule which relates exclusively to the Human Rights Act scheme. As later developed in the House of Lords,<sup>11</sup> the basis of the difference is that, in the scheme of the Scotland Act, the rule on incompatibility with Convention rights plays a distinctive role as one of several restrictions on legislative and executive competence. In relation to the enforcement of these restrictions, as “devolution issues”, there is no general time bar. So there should be no such bar in the case of human rights proceedings.

7 For the rejection of a *lex specialis/generalis* argument, see, in particular, *Somerville* at para 106 per Lord Rodger.

8 For the use of sections of the Human Rights Act as a “dictionary” for understanding the Scotland Act, see especially *Somerville* at para 22 per Lord Hope.

9 2007 SC 140 at para 52.

10 A third logic, not discussed in the case itself, would have derived from the advantages of maintaining an equivalent degree of liability for shortcomings in prisons in Scotland and England – a point apparently taken up subsequently between the two Governments. See n 29 below.

11 See especially *Somerville* at para 34 per Lord Hope.

It seems fair to say that, despite the efforts, such as they were, to interlink the two Acts it was never going to be easy to prescribe comprehensively and with complete precision what the resulting pattern of rules should be. There was always likely to be a remaining interpretative task for the courts.

Although it is surrounded by other complexities, at the heart of this task was discerning the meaning of section 100 of the Scotland Act. In its articulation of the “victim” and “damages” restrictions on court proceedings, did it presuppose an underlying right to a remedy on grounds of Convention incompatibility deriving from the Scotland Act or did it indicate a reliance upon the Human Right Act whose remedial scheme would necessarily have to be also engaged for a remedy to be pursued? What made the successive decisions in *Somerville* so interesting was that in *R v H M Advocate*<sup>12</sup> a majority (including Lords Hope and Rodger) in the Judicial Committee of the Privy Council had already taken a view on this issue. The terms of section 100, as read with section 57(2), pointed to the existence of a distinctive route to remedies under the Scotland Act and, in the Outer House, Lady Smith had declared herself bound by this conclusion.<sup>13</sup> In the Inner House, the court acknowledged that it too would be bound by the ratio in *R* but held that the relevant dicta in the case were *obiter*.<sup>14</sup>

This did not mean, however, that they could be ignored and the Inner House admitted that as “they were enunciated by judges of great distinction it is incumbent on us to explain why it is that respectfully we are unable to share their views”.<sup>15</sup> And this they did, on the basis of their overarching view of an interrelationship between the two Acts, both being constitutional instruments enacted virtually contemporaneously and accordingly being required to be read together.<sup>16</sup>

In so far as Lords Hope and Rodger suggested that, where there is a devolution issue, damages fall to be claimed under the Scotland Act rather than the Human Rights Act, their observations were *obiter*, and erroneous . . . . The proper basis for a claim for damages for an act in breach of Convention rights is, however, that such an act is unlawful and that a claim for damages (limited to just satisfaction) is made available under section 8 of the Human Rights Act. It follows that such a claim is properly subject to the time-bar imposed by section 7(5) of the Human Rights Act.

### C. SOMERVILLE IN THE HOUSE OF LORDS

The Inner House was not, of course, given the last word. The appeal to the House of Lords provided the opportunity for Lords Hope and Rodger to respond – an opportunity taken up with gusto. Their speeches provide an excellent case study of the deployment of the great guns of top court statutory interpretation against their

12 2003 SC (PC) 21. See C Himsworth, “Jurisdictional divergences over the reasonable time guarantee in criminal trials” (2004) 8 EdinLR 255.

13 [2005] CSOH 24 at para 56.

14 2007 SC 140 at paras 57, 72.

15 2007 SC 140 at para 72.

16 2007 SC 140 at paras 79, 80.

juniors in the Inner House. Happily for them, they were eventually joined on this issue by Lord Walker of Gestingthorpe who had earlier confessed to finding the point more difficult than his divided colleagues, where each pair of judges had regarded the outcome as tolerably clear.<sup>17</sup>

For Lord Hope, a starting proposition, in response to an argument on behalf of the Scottish Ministers that it was unlikely that Parliament intended to confer a remedy under the Scotland Act which was an alternative to and inconsistent with that under the Human Rights Act, was that it was idle to speculate as to whether such an outcome was likely or unlikely. “The answer,” he said, “is to be found in the words used by the statutes, to which careful attention must be paid in order to discover the intention of Parliament”.<sup>18</sup> This was a theme to which he returned as he systematically addressed and repulsed the conclusions of the First Division.

That Court had said that the effect of section 129(2) of the Scotland Act was that the Human Rights Act was to be treated as in force for the purposes of the Scotland Act from the date when the Scotland Act came into force. “But that is not,” Lord Hope said, “what s 129(2) says”.<sup>19</sup> The First Division had said that the same subsection pointed to an intention of Parliament that the Scotland Act should be read and construed consistently with the Human Rights Act and that this was inconsistent with the notion that the Scotland Act was a self-contained, self-standing and self-understood instrument. But this, Lord Hope responded, overstated the effect of section 129(2).<sup>20</sup> “A careful and accurate reading” of the subsection was important.<sup>21</sup> He rejected an argument which would leave the Scotland Act unable to provide a remedy in damages as this would have left a “transitional loophole” in the period prior to October 2000.<sup>22</sup>

Moving on to section 100 of the Scotland Act, the interpretation offered by the First Division came under further attack. The Division had said that its assumption of reliance on the Human Rights Act for all claims of damages enabled a “rational meaning” to be given to the section, rather than distorting it into an assertion of an implied positive right.<sup>23</sup> But this approach, said Lord Hope, failed to address the “precise wording” of section 100(1) and (3).<sup>24</sup> The effect of the provision made was that the Acts offered two alternative routes to remedies in damages. The Human Rights Act route incorporated the 12-month time bar. The Scotland Act route did not. Litigants who based their claims on acts of the Scottish Executive had a choice of routes.<sup>25</sup>

Finally, Lord Hope reached the First Division’s treatment of the views he had himself expressed in *R v HM Advocate*. “The First Division said in its opinion in this

<sup>17</sup> Paras 163, 166.

<sup>18</sup> Para 11.

<sup>19</sup> Para 23.

<sup>20</sup> Para 23.

<sup>21</sup> Para 24.

<sup>22</sup> Para 25.

<sup>23</sup> Para 29.

<sup>24</sup> Para 30.

<sup>25</sup> Para 31.

case that I was mistaken in my construction of s 100 ... But I see no reason to depart from what I said about s 100(1)(b) in *R v HM Advocate*. On the contrary, I am unable to accept their interpretation of that subsection or of s 100(3). In my opinion, a careful and accurate reading of these two sections, taken together, provides ample support for ... the conclusion that a remedy was available under the Scotland Act”.<sup>26</sup>

Lord Rodger adopted a similarly robust response to the First Division’s treatment of his own analysis in *R v HM Advocate* of section 100. “That analysis was not necessary for the decision in the case. The First Division were therefore entitled to depart from it. Which they did, holding that my construction of the section was erroneous, and that its meaning had been distorted”. Lord Rodger continued: “[W]hile saying that s 100 has been ‘distorted’, they do not themselves address and analyse the language of the section. Without such an analysis, it is impossible to determine the meaning and purpose of the provision”.<sup>27</sup> Yet another acerbic put-down of the Division’s reasoning.

In the period leading to the launch of devolution in 1999, concerns were raised about the prospect of the decisions of the Scottish Parliament and Scottish Executive in Edinburgh being overturned by the Judicial Committee or the House of Lords in London. So far, however, such conflicts between politicians and restraining judges have not materialised.<sup>28</sup> What *Somerville* has produced, apart from new opportunities for successful claims in damages by prisoners,<sup>29</sup> has been an insight into the potential that devolution has brought for just as bitter a conflict between the Inner House and their counterparts in the House of Lords on one of the most fundamental aspects of the constitutional settlement.

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<sup>26</sup> Para 38.

<sup>27</sup> Para 120.

<sup>28</sup> But *Somerville* itself does have the capacity to raise difficulties between governments. In his excellent analysis of the case, Iain Jamieson has explored not only some of the further difficulties to be faced before a full resolution of the impact of the two Acts can be achieved (including the sustainability of distinctions between claims for damages based on “invalidity” and others based on “incompatibility”) but also the merits of the request apparently made by the Scottish Government to the UK Government to reverse by legislation the effect of *Somerville*. See I Jamieson, “Damages under the Scotland Act: implications of *Somerville*” 2007 SLT (News) 289.

<sup>29</sup> The actions in the *Somerville* case itself return to the Outer House where they were launched in February 2004. Judges in the House of Lords complained bitterly of the unnecessary complexity of the case and the resulting delay. See *Somerville* at para 9 per Lord Hope, paras 160-162 per Lord Walker and paras 88 and 159 per Lord Rodger.